

# Native-Born Acadians and the Equality Ideal

James Harvey Domengeaux

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## NATIVE-BORN ACADIANS AND THE EQUALITY IDEAL

### *Introduction*

Title VII of the Civil Rights Act (the Act) of 1964 makes it unlawful for employers' "[t]o fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . national origin."<sup>2</sup> Part I of this article will attempt to define the status of the native-born Acadian employee under this section by analyzing the statute's legislative history, judicial interpretations and administrative guidelines.

Section 1981 of the Civil Rights Act of 1866<sup>3</sup> guarantees "[a]ll persons within the jurisdiction of the United States . . . the same right . . . to make and enforce contracts . . . and to the full and equal benefits of all laws . . . as is enjoyed by white citizens." Part II of this article will review the history of Section 1981 and explore whether that statute protects native-born Acadians or other "white" ethnic group members in light of the inconsistent interpretations given it by the lower federal courts.

The equal protection clause<sup>4</sup> of the Fourteenth Amendment of the United States Constitution proscribes the denial by a state "[t]o any person within its jurisdiction [of] the equal protection of the laws." Part III will examine the United States Supreme Court's application of the equal protection clause to claims of discrimination based on national origin, and will discuss the prerequisites of "state action" and "pur-

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\* The author wishes to dedicate this article to his uncle, former Congressman James Domengeaux, Chairman of the Council for the Development of French in Louisiana. The author also wishes to acknowledge the guidance of Paul R. Baier, Professor of Law, Paul M. Hebert Law Center, Louisiana State University, Judicial Fellow, Supreme Court of the United States, 1975-1976.

1. For purposes of the Act, "Employer" means a person engaged in an industry affecting commerce, who has fifteen or more employees. 42 U.S.C. § 2000e(b) (1976); cf. La. R.S. 23:1006 (1983) (Intentional Discrimination in Employment Act). For purposes of Title VII, "employment agencies" and "labor organizations" have the same status as an "employer."

2. 42 U.S.C. § 2000e-2(a)(1) (1976).

3. 42 U.S.C. § 1981 (1976).

4. U.S. Const. amend. XIV, § 1.

poseful discrimination" necessary to assert a claim under the equal protection clause. This analysis will then be applied to a hypothetical claim of class-based discrimination raised by a native-born Acadian.

Finally, Part IV examines the Acadian's rights to individual dignity and cultural expression under the Louisiana Constitution of 1974. To give the reader an idea of the forms of official discrimination that have been waged against Acadians in the past, an analysis of the early constitutions is discussed.

This article suggests the following. First, Acadians are entitled to "national origin" protection under Title VII in light of the legislative history and judicial and administrative interpretations of the Act; second, Section 1981, in view of its historical setting, the protection it affords to "whites" and aliens, and the ambiguous interpretations of "race," should provide native-born Acadians protection against invidious class-based discrimination; third, the equal protection clause was adopted to cure the evils of intentional discrimination against people on the basis of certain "suspect" classifications such as "race" and "national origin." As a result, purposeful discrimination directed against Acadians which can fairly be attributed to the state will subject such conduct to the highest form of judicial scrutiny and render the conduct unconstitutional. Finally, under the Louisiana Constitution of 1974 and various Louisiana statutes, Acadians are afforded every opportunity to fully develop their cultural heritage and are entitled to protection from arbitrary and capricious governmental classifications.

### *Preface*

Currently, approximately 800,000 Acadians reside in south Louisiana and another 20,000 live in the New England states.<sup>5</sup> The Acadians are unified by a loyal adherence to their religion, family life, language, and fun-loving customs. Nevertheless, any sociological attempts to strictly categorize the Acadian will meet with frustration. He is as diverse in his political ideologies, economic status, and employment affiliations as any other ethnic or national origin group in America. Since the migration of the Acadians to America from present day Nova Scotia over two hundred years ago, this group has adhered to a diligent work ethic, code of honor and celebration of life.

### *The Acadians and "Le Grand Dérangement"*

In the early seventeenth century, following the practice of the major European empires, France established a North American colony in Acadie

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5. 1980 estimated figures. S. Thernstrom, Harvard Encyclopedia of American Ethnic Groups 1. (1980). [hereinafter cited as Thernstrom]. The problem with accurately tracing the true census accounting of "white" ethnic groups such as Acadians is that the census does not document an American's "national origin" unless he is "Spanish surnamed."

or Acadia, a region which consisted of present day Nova Scotia, New Brunswick, Prince Edward Island, and part of the state of Maine.<sup>6</sup> Inhabitants from northwest and central France were recruited to help settle and develop the land. These new frontiersmen diligently and successfully established a prosperous area. The new settlers primarily co-existed in a rural community life.

Throughout the years, the Acadians developed their own customs and lifestyle which brought on a feeling of pride and solidarity:

Over time, just as English settlers and pioneers came to think of themselves as Americans, the Acadians began to consider themselves as a people distinct and apart from their fellow Frenchmen. They . . . had come under English rule in 1713 as a result of the treaty of Utrecht that ended one of several French-English wars. At the time they were directed to withdraw into French territory or to swear unconditional loyalty to the English monarch, but apparently they did neither and continued to prosper as before.<sup>7</sup>

Under English domain, the Acadians did, however, sign conditional oaths of allegiance to England with the understanding that they would refuse to bear arms against France in the event of a military confrontation between England and France. They became known by the British as "French Neutrals."<sup>8</sup>

As relations between England and France became more strained, the English authorities feared that the Acadians posed a national security risk because of their refusal to sign the unconditional oaths of allegiance to the British crown. In 1755, after again refusing to sign the oaths, the Acadians' properties were confiscated, their families were dispersed, and groups were loaded on ships destined for the British colonies and Europe. This mass movement became known as "Le Grand Dérangement"—The Great Displacement.<sup>9</sup>

### *The Acadian Migration*

The exile of 1755 brought many Acadians to the British colonies in America, where they lived in poverty and were persecuted because of their language and steadfast devotion to the Roman Catholic faith:

In Boston they were treated as slaves. New York's governor persuaded them to emigrate to Santo Domingo, where, naked

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6. Thernstrom, *supra* note 5, at 6.

7. *Id.* at 1. See also *Roach v. Dresser Indus. Valve & Instrument Div.*, 494 F. Supp. 215 (W.D. La. 1980).

8. See *Roach*, 494 F. Supp. at 216.

9. Thernstrom, *supra* note 5, at 1.

and destitute, many of them perished. North and South Carolinians enticed some 2,000 of them to board leaky vessels to return to Acadia, their homeland. Only 900 made it alive. Those dumped in Georgia fled immediately, for they preferred death to the slavery to which they would have been condemned. Destitute, mistreated, unwelcome, the miserable exiles found no friendly government among these colonies, except in Connecticut, where they were treated as human beings.<sup>10</sup>

Word spread that the Acadians would be well received in the Spanish colony of Louisiana, which was still deeply French in its culture. In 1764, the first Acadians reached Louisiana, and by 1767, hundreds had emigrated to south Louisiana.<sup>11</sup>

By the time of the Louisiana Purchase in 1803, there was a constant growth of Acadian settlements in south Louisiana. Many of the Acadians continued to live as they did in Acadia as small proprietors. A substantial number of the new settlers prospered as fishermen and trappers, and in the Opelousas and Attakapas regions, many concentrated on raising and selling cattle.<sup>12</sup>

### *The Acadian-American Experience*

Throughout the nineteenth and early twentieth centuries, the Acadians by and large lived in isolated rural areas, faithfully clinging to their insular customs, French language and devotion to the Roman Catholic church. The Acadians maintained large families, and by 1880, their population rose to 270,000.<sup>13</sup> Because of the Acadians' Catholic practices in an area that was predominately Protestant, and because of their preservation of their language and community, their Anglo neighbors saw them as backward and ignorant. As a result, the Acadians were ostracized and discriminated against throughout this period.<sup>14</sup>

With the advancement of technology and education in the twentieth century, the provincialism of the Acadians' lifestyle conflicted even more with the rest of society. Innovations such as new roads and bridges, motion pictures, and compulsory school attendance paved the way for a sociological transition.<sup>15</sup> Educators barred the use of French in the classrooms, and French-speaking pupils were severely disciplined for

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10. Chandler, "In Search of a Friendly Land," *Acadian Profile*, Vol. 12, No. 1, at 26 (1985).

11. *Roach*, 494 F. Supp. at 217.

12. Thernstrom, *supra* note 5, at 1.

13. *Id.*

14. See Thernstrom, *supra* note 5, at 1.

15. *Id.*

speaking French.<sup>15a</sup> The result was a practically irreversible psychological scar which connected the speaking of French with ignorance and shame. The long term result was that the language was nearly lost and the solidarity of a culture severely tested.

### *The Acadian Revival*

During the post-World War II era, many Acadians experienced occupational and geographic mobility. The blossoming of the oil and gas industries in Louisiana offered alternatives to the primarily rural existence of the Acadian people. This new prosperity brought an opportunity for the Acadian to fully integrate into the American socio-economic pattern. In 1968, the Council for the Development of French in Louisiana (CODOFIL) was created. CODOFIL, a state agency, represented an official endorsement of what later became known as the Louisiana French renaissance movement.<sup>16</sup> CODOFIL has been credited with successfully implementing the teaching of French in elementary and high school curriculums and reawakening the conscience of a proud people to whom the preservation of the French language and Acadian culture is of paramount concern.

Currently, pride in the Acadian culture is soaring and the future of the Acadian people is sound. One can feel this "born again" pride by observing and conversing with Acadians in the many south Louisiana cities and villages. The mood is upbeat and a dedication to preserve the Acadian culture is intact. In no area is the dignity and wholesomeness of the Acadian people as aptly reflected as in their music.<sup>17</sup> In the last two decades, Acadian musicians have been invaluable in reinstating the self esteem and pride of a once deflated people.

### *Discrimination Against Acadians in the Work Place*

Although immense pride in the Acadian culture is prominent in the eyes of the Acadian and his neighbor alike, and regardless of the nationwide popularity of Acadian cuisine and celebrations, vestiges of the stereotype of the Acadian as backward and illiterate persist. In many instances, this prejudicial attitude has infiltrated the workplace.

As a result of post-World War II prosperity in Louisiana, large influxes of non-Louisianians found their way to "Acadiana."<sup>18</sup> Most of these newcomers quickly embraced the Acadian way of life. Nevertheless,

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15a. "The New Louisiana Story," 120 Cong. Rec. 5417, 5418 (March 5, 1974).

16. B. Ancelet and E. Morgan, Jr., *The Makers of Cajun Music* 31 (1984).

17. For an excellent account of the history and current status of Acadian music, see Ancelet and Morgan, *id.*

18. "Acadiana" is the popular name for 22 parishes in southwest and central Louisiana where the population is heavily represented by Acadians and French descendants.

some of "Les Americains"<sup>19</sup> perpetuated the stereotypes commenced by their Anglo-Saxon predecessors and thus produced a tainted atmosphere in the work place. Much of the prejudice directed against Acadians is religious in nature; however, a substantial amount is probably the result of the image of the Acadian as an illiterate, shallow and self-indulgent creature.

# I. NATIONAL ORIGIN DISCRIMINATION AND THE NATIVE-BORN ACADIAN UNDER TITLE VII

## A. Legislative Intent of Title VII

In *Griggs v. Duke Power Co.*,<sup>20</sup> the Supreme Court paraphrased the command of Title VII as follows: "What is required by Congress is the removal of artificial, arbitrary and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classifications."<sup>21</sup> Title VII, enacted in 1964, is broader than the Civil Rights legislation enacted in the aftermath of the Civil War, as it explicitly covers classifications other than racial groups. Employment practices which have a detrimental impact or effect upon an individual because of his or her religion,<sup>22</sup> sex,<sup>23</sup> or national origin<sup>24</sup> are also proscribed.

In 1975, the United States Fifth Circuit Court of Appeals summed up the laudable goal of Congress in enacting Title VII: "Equal employment opportunity may be secured only when employers are barred from discriminating against employees on the basis of immutable characteristics, such as race and national origin."<sup>25</sup> The same court said in 1980: "[N]o one can change his place of birth (national origin), the place of birth of his forbears (national origin), his race or fundamental sexual characteristics."<sup>26</sup> That court has also stated: "[Title VII] should be accorded a liberal interpretation in order to effectuate the purpose of Congress to eliminate the inconvenience, unfairness, and humiliation of ethnic discrimination."<sup>27</sup>

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19. "Les Americains" is a term commonly used by the older Acadians when referring to their Anglo neighbors.

20. 401 U.S. 424, 91 S. Ct. 849 (1971).

21. *Id.* at 431, 91 S. Ct. at 893; see also *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 96 S. Ct. 1251 (1976) (Congress' intent was to prohibit all practices which create inequality in employment due to race, religion, sex, or national origin classifications. *Id.* at 763, 96 S. Ct. at 1263.); cf. *Caviale v. Wisconsin*, 744 F.2d 1289, 1292-93 (7th Cir. 1984).

22. *Cummins v. Parker Seal Co.*, 516 F.2d 544 (6th Cir. 1975).

23. *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981).

24. See *Saucedo v. Brothers Well Serv., Inc.*, 464 F. Supp. 919 (S.D. Tex. 1979).

25. *Willingham v. Macon Tel. Publishing Co.*, 507 F.2d 1084 (5th Cir. 1975) (en banc).

26. *Garcia v. Gloor*, 618 F.2d 264, 269 (5th Cir. 1980).

27. *Rogers v. Equal Employment Opportunity Comm'n*, 454 F.2d 234, 238 (5th Cir. 1971).

### B. Definition of National Origin

There is little authority indicating what Congress intended when it included "national origin" as a protected classification under Title VII. In the hearings relevant to the passage of the Act, Congressman James Roosevelt of California attempted to clear up some confusion with the following statement: "May I just make very clear that 'national origin' means national. It means the country from which your forbears came from. You may come from Poland, Czechoslovakia, England, France, or any other country."<sup>28</sup> Congressman Dent added: "[N]ational origin, of course, has nothing to do with color, religion, or the race of an individual. A man may have migrated from Great Britain and still be a colored person."<sup>29</sup>

An earlier version of Title VII had referred to discrimination based on "race, color, religion, national origin, or ancestry."<sup>30</sup> Exclusion of the word "ancestry," however, from the final version of the Act suggests that the terms "national origin" and "ancestry" were considered synonymous.<sup>31</sup> Therefore, it is clear that Congress intended to include in the term "national origin" groups of persons of common ancestry, heritage or background.<sup>32</sup>

On December 29, 1980, the Equal Employment Opportunity Commission<sup>33</sup> promulgated a revision to its Guidelines on Discrimination Because of National Origin,<sup>34</sup> which substantially expanded the definition of national origin discrimination.<sup>35</sup> The basic definition is presently as

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28. 110 Cong. Rec. 2549 (1964).

29. *Id.*

30. H.R. 7152, 88th Cong., 1st Sess. § 804 (1963) (Comm. print). See also *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 89, 94 S. Ct. 334, 337 (1973).

31. H. R. Rep. No. 914, 88th Cong., 1st Sess. 87 (1963). See also *Espinoza*, 414 U.S. at 89, 94 S. Ct. at 337.

32. See B. Schlei & P. Grossman, *Employment Discrimination Law* 305 (1983) [hereinafter cited as Schlei & Grossman]; see also Note, *Language Discrimination under Title VII: The Silent Right of National Origin Discrimination*, 15 J. Mar. L. Rev. 667 (1982); cf. *Thomas v. Rohner-Gehrig & Co.*, 582 F. Supp. 669, 679 (N.D. Ill. 1984) (Defendant employer conceded that national origin discrimination encompasses a person's ancestry, heritage, and background for purposes of Title VII.).

33. The E.E.O.C., a federal administrative agency, from time to time issues guidelines interpreting different aspects of Title VII. The administrative interpretation of Title VII by the E.E.O.C. is entitled to great deference. *United States v. Chicago*, 400 U.S. 8, 91 S. Ct. 18 (1970). Furthermore, where Title VII and its legislative history support the E.E.O.C.'s construction, the guidelines express the will of Congress. *Griggs*, 401 U.S. at 435, 91 S. Ct. at 855.

34. 29 C.F.R. § 1606 (1985).

35. The general definition refers to "national origin discrimination" and is not limited to "national origin"; see 3 A. Larson & L. Larson, *Employment Discrimination* § 93:20 at 20-23 (1984) [hereinafter cited as Larson]. *Contra* 8 Lab. Rel. Rep. (BNA) 421:751 (1978) ("Country of Birth").



follows: "The Commission defines national origin discrimination broadly as including, but not limited to, the denial of equal employment because of an individual's, or his or her ancestor's, place of origin; or because an individual has the physical, cultural or linguistic characteristics of a national origin group."<sup>36</sup> The Commission made it clear in its public comments accompanying the Guidelines<sup>37</sup> that national origin discrimination was not limited to "country of origin." The Commission said:

Several commentators correctly noted that for an individual to be protected against national origin [discrimination, it is not necessary that the individual]<sup>38</sup> or his ancestors have their origin in a sovereign nation. See, for example, *Roach v. Dresser Industries*, 23 FED CASES 1073 (W.D. La. 1980), where the court held that a person of Acadian descent ("Cajun") could sue under Title VII for national origin discrimination. Because the phrase "country of origin" may imply a reference to a sovereign nation, it has been substituted by the phrase "place of origin."<sup>39</sup>

The Commission was correct in delineating broadly national origin discrimination. "Nation" and "Country," although used interchangeably in many instances, are not synonymous.<sup>40</sup> Furthermore, to fully incorporate Title VII's goal of maintaining a work place free of invidious discrimination, it should be irrelevant whether an ethnic American's ancestors were "loyal subjects of the Crown" in a sovereign country, or rebellious farmers in a territorial province.

"National origin" protection under Title VII does not make it illegal to discriminate against an individual on the basis of citizenship or alienage.<sup>41</sup> Nevertheless, the E.E.O.C. and the courts have included within the category of "national origin," members of all national groups and groups of persons of common ancestry, heritage, or background.<sup>42</sup> Some of the groups considered protected are Hungarians,<sup>43</sup> Slavics,<sup>44</sup>

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36. 29 C.F.R. § 1606.1 (1985); see also *Larson and Larson*, supra note 35, § 93:20 at 20-23.

37. 45 Fed. Reg. 85632 (1980).

38. A reading of this paragraph will reveal that an obvious typographical mistake was made by the E.E.O.C. It is apparent that the bracketed language supplied is the correct version.

39. 45 Fed. Reg. at 85633.

40. "'Nation' is defined as: 'a distinct race or people, characterized by common descent, language or history, usually organized as a separate political state and occupying a definite territory.' The Oxford Universal Dictionary, p. 1311." *Larson and Larson*, supra note 35, at 20-4.

41. *Espinoza*, 414 U.S. 86, 94 S. Ct. 334.

42. See *Schlei & Grossman*, supra note 32, at 305.

43. *Morvay v. Maghielse Tool & Die Co.*, 708 F.2d 229 (6th Cir. 1983); *Fekete v. United States Steel Corp.*, 424 F.2d 331 (3d Cir. 1970).

44. *Sklenar v. Central Bd. of Educ.*, 497 F. Supp. 1154 (E.D. Mich. 1980); *Budinsky v. Corning Glass Works*, 425 F. Supp. 786 (W.D. Pa. 1977).

Arabs,<sup>45</sup> East Indians,<sup>46</sup> Americans,<sup>47</sup> Hispanics of "Puerto Rican descent,"<sup>48</sup> New Zealanders,<sup>49</sup> Pakistanis,<sup>50</sup> Hawaiians,<sup>51</sup> Native Alaskans,<sup>52</sup> and by implication, White Anglo-Saxon Protestants.<sup>53</sup>

*C. Roach v. Dresser Industries Valve & Instrument Division*

*Roach v. Dresser Industries Valve & Instrument Division*<sup>54</sup> is the only reported decision in which a native-born Acadian brought suit under Title VII challenging an unlawful employment practice by his employer because of his national origin. The plaintiff alleged that his employment with Dresser Industries was terminated because of his national origin (Acadian) and his association with Acadian co-employees. In particular, he alleged:

On March 31, 1977, plaintiff was terminated from his employment with defendant, Dresser Industries, Inc., because of his national origin and his association with co-employees of the same national origin, to-wit, Acadians or "Cajuns," and because he objected to excessive and opprobrious derogatory comments made by members of the management of defendant relating to co-employees who were Acadian or "Cajuns" and to co-employees who were black.<sup>55</sup>

The defendant demurred, insisting that since Acadia is not and never was a sovereign nation, as a matter of law, plaintiff had no standing under Title VII to bring the claim.<sup>56</sup>

Judge Hunter first addressed the issue of the proper definition of an Acadian. The judge said:

Controversy, emotionalism and the import of Longfellow's "Evangeline" have contributed to many stereotyped and oversimplified characterizations of the Acadian people. In the context

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45. *Ibrahim v. New York State Dept. of Health*, 581 F. Supp. 228 (E.D.N.Y. 1984).

46. *Sethy v. Alameda County Water Dist.*, 545 F.2d 1157 (9th Cir. 1976); see also *Schlei & Grossman*, *supra* note 32, at 305 n.9.

47. *Earnhardt v. Commonwealth of Puerto Rico*, 744 F.2d 1 (1st Cir. 1984); *Bilka v. Pepe's Inc.*, 601 F. Supp. 1254 (N.D. Ill. 1985); *Thomas v. Rohner-Gehrig & Co.*, 582 F. Supp. 669 (N.D. Ill. 1984).

48. *Garcia v. Gardner's Nurseries, Inc.*, 585 F. Supp. 369 (D. Conn. 1984).

49. *Bell v. Home Life Ins. Co.*, 596 F. Supp. 1549 (M.D.N.C. 1984).

50. *Iftikhar v. Boorstin*, 36 F.E.P. 1345 (April 4, 1984).

51. 3 F.E.P. 390 (Mar. 1, 1971); see also *Larson and Larson*, *supra* note 35, at 20-22.

52. *Domingo v. New England Fish Co.*, 445 F. Supp. 421 (W.D. Wash. 1977).

53. *Buck v. Board of Educ.*, 5 F.E.P. 519 (Dec. 15, 1972).

54. 494 F. Supp. 215 (W.D. La. 1980).

55. *Roach*, Civil Action No. 78-0157 (W.D. La. 1980).

56. 494 F. Supp. at 216.

of this litigation we agree . . . that a "Cajun" is properly defined as an Acadian, and that one is a "Cajun" only if his ancestry includes someone who once lived in Acadia.<sup>57</sup>

The judge also alluded in a footnote<sup>58</sup> that although many southwest Louisianians consider themselves or are considered by others to be Acadians, for purposes of "national origin" status under Title VII, a party must be able to trace his roots to someone who once lived in Acadia.<sup>59</sup>

In holding that the case would be heard on its merits,<sup>60</sup> and in rejecting the defendant's contentions that since Acadia is not and never was an independent, sovereign nation, it could not be Calvin Roach's<sup>61</sup> "national origin," the judge said: "Distinctions between citizens solely because of their ancestors are odious to a free people whose institutions are founded upon the doctrine of equality, and we decline to accept the argument that litigation of this sort should be governed by the principles of sovereignty."<sup>62</sup>

The E.E.O.C. cited *Roach* approvingly in its Comments to its Guidelines on Discrimination Because of National Origin<sup>63</sup> for the proposition that national origin is determined from a person's "place of origin" and not limited to his "country of origin" (sovereignty).

#### D. "Mistaken" National Origin Discrimination in South Louisiana

The general E.E.O.C. definition discussed earlier<sup>64</sup> is in two parts, joined by the disjunctive "or." The first part of the definition regards

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57. *Id.*

58. *Id.* at 216-17 n.1:

Many people living in Southwestern Louisiana consider themselves to be Cajuns despite the fact they may not trace their ancestry to the colony of Acadia (Tr. 76, Hebert). Moreover, these people are considered by others to be Cajuns. Such a definition transcends traditional boundaries such as national origin, which is often the basis for formation of ethnic groups. It also stresses the openness so characteristic of South Louisiana (Tr. 244, Joubert), but in the context of "national origin" this definition may not be utilized in this litigation. In this latter category, according to the testimony of Dr. Arceneaux and Mr. Domengeaux, is the Honorable Edwin Edwards, who served as Governor of Louisiana from 1972-80.

59. Many Acadian descendants have ancestors who were not originally French, but Anglo-Saxon. However, when these Anglo-Saxons integrated into the Acadian communities, they took on the identity of the Acadian and became absorbed by the French influence and spoke French. Furthermore, they considered themselves to be Acadians. See *id.* at 217.

60. The case was subsequently settled out of court in favor of Mr. Roach.

61. Although Mr. Roach spells his name in an Anglo fashion, his grandfather spelled it in the French form - Roche. (Telephone interview with Roach's attorney, Daniel E. Brousard, Jr., June 25, 1985).

62. 494 F. Supp. at 218.

63. See 45 Fed. Reg. 85632 (1980).

64. 29 C.F.R. § 1606.1 (1985).

the employee's actual ancestral origins. The second part addresses the employer's subjective perceptions of the employee's national origin, based on the employee's physical, cultural, and linguistic characteristics.<sup>65</sup> In the Commission's view, it is enough that the aggrieved party's accent, appearance or physical characteristics were the cause of differential treatment, regardless of whether the discriminator knew the particular national origin group to which the complainant belonged, for there to be a violation of Title VII.<sup>66</sup>

In *Berke v. Ohio Department of Public Welfare*,<sup>67</sup> the plaintiff, Ms. Berke, was born in Poland and eventually emigrated to the United States. Although she was a registered nurse with an advanced degree in communications, and her fluency in the English language was well above average, the Ohio Department of Welfare denied Ms. Berke employment because of her pronounced foreign accent. The sixth circuit affirmed the unpublished district court opinion which had held that it was sufficient that the employer treated her differently because she had a "foreign accent," for there to have been improper discrimination.

*Berke* may be extended to protect the Acadian employee. Suppose a well-educated Acadian with a noticable accent<sup>68</sup> gets a job in a state where the inhabitants are unfamiliar with Acadians. If the Acadian would be denied promotions or otherwise be treated differently by his employers because of his Acadian accent, it would be immaterial whether the employer knew the employee's national origin (Acadian).

"Mistaken" national origin discrimination may also arise with respect to French-Americans from Avoyelles Parish, located in central Louisiana. Many, but not all, of the French descendants from Avoyelles Parish are not Acadians in the legal sense,<sup>69</sup> because their ancestors emigrated to the United States and Louisiana from France and not Acadia or Nova Scotia. Nevertheless, many of these same people have fully embraced and substantially contributed to the Acadian culture and cause, and as a result, they maintain an Acadian accent. If an Avoyelles Parish Frenchman were to be discriminated against by his employer because he was thought to be an Acadian, under the E.E.O.C. Guidelines, the employee would have standing under Title VII to bring an employment discrimination action.

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65. Larson and Larson, *supra* note 35 at 20-25.

66. 45 Fed. Reg. at 85633.

67. 628 F.2d 980 (6th Cir. 1977).

68. The Acadian accent, although not easy to describe in writing, has a well-defined French influence in its delivery, and is primarily limited to the inhabitants of Louisiana. It is a source of pride for many Acadians, although with the great influence of nationwide television, many Acadian children no longer maintain the accent.

69. See *supra* notes 58-59.

The E.E.O.C. contends in the same Guidelines that protection from "mistaken" national origin discrimination extends to those to whom the following characteristics apply:

- (a) Marriage to or association with persons of a national origin group;
- (b) Membership in, or association with an organization identified with or seeking to promote the interests of a national origin group;
- (c) Attendance or participation in schools, churches, temples or mosques generally used by persons of a national origin group;
- (d) Use of an individual's or spouse's name which is associated with a national origin group.<sup>70</sup>

Hence, if a person of German or Jewish descent marries a Begnaud,<sup>71</sup> or is a member of CODOFIL, and can show that he or she has been denied equal employment opportunities on account of his or her association with the Acadian person or entity, and the reasons for the caustic treatment are indeed discriminatory based on national origin, the E.E.O.C. will "examine with particular concern" these charges by applying general Title VII principles, such as disparate treatment and adverse impact.

#### *E. Disparate Treatment Against Acadians and Problems of Proof*

In order for an Acadian plaintiff to recover in an employment discrimination suit, it is necessary that he show that the defendant "failed or refused to hire or [discharged him] or otherwise [discriminated against him] with respect to his compensation, terms, conditions, or privileges of employment because of [his] . . . national origin."<sup>72</sup>

The two principal theories of employment discrimination developed by the Supreme Court since the enactment of Title VII are disparate treatment and adverse (or disparate) impact. Disparate treatment refers to different treatment of an individual on account of some immutable characteristic, such as race, sex, national origin, age or handicap. In practice, "[t]he usual disparate case is an individual case, and the focus of the contest is on the employer's motivation for the different action taken, with the plaintiff attempting to prove intentional bias and the employer contending that its actions were based on a legitimate, non-discriminatory reason."<sup>73</sup> On the other hand, under the adverse impact

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70. 29 C.F.R. § 1606.1 (1985).

71. A prominent Acadian surname.

72. 42 U.S.C. § 2000e - 2(a)(1) (1976).

73. Schlei & Grossman, *supra* note 32, at 1286.

theory, focus lies upon the effects of the alleged discriminatory practice rather than on the employer's motivation or intent.<sup>74</sup> As the Supreme Court noted in *Griggs*: "Good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as "built-in headwinds" for minority groups and are unrelated to measuring job capability . . . Congress directed the thrust of the Act to the consequences of the employment practices, not simply the motivation."<sup>75</sup>

This section will provide a general analysis of the proof considerations solely with respect to the theory of disparate treatment. Practically speaking, the vast majority of actual or potentially discriminatory practices directed against Acadian laborers involve prejudicially motivated actions by an employer against the employee rather than covert or neutral company plans or policies which have an adverse impact upon Acadians as a group.

In a disparate treatment suit, the ultimate issue is whether the employer intentionally discriminated against the plaintiff.<sup>76</sup> Proof may be by direct evidence of a discriminatory motive,<sup>77</sup> or by indirect evidence from which an inference of discriminatory motive may be drawn.<sup>78</sup> The inference may be drawn from "comparative evidence demonstrating that the treatment of the plaintiff differs from that accorded to otherwise 'similarly situated' individuals who are not within the plaintiff's protected group."<sup>79</sup>

In *McDonnell Douglas Corp. v. Green*,<sup>80</sup> the Supreme Court set forth a framework for establishing a prima facie case of disparate treatment. The model required that the plaintiff prove four elements:

- (i) That he belongs to a class protected under Title VII;
- (ii) That he applied and was qualified for a job for which the employer was seeking applications;
- (iii) That, despite his qualifications, he was rejected; and
- (iv) That, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.<sup>81</sup>

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74. *Id.* at 1287.

75. 401 U.S. at 432, 91 S. Ct. at 854.

76. *Thornbrough v. Columbus & Greenville R.R.*, 760 F.2d 633 (5th Cir. 1985).

77. See *Schlei & Grossman*, *supra* note 32, at 1291.

78. *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15, 975 S. Ct. 1843, 1854 n.15 (1977).

79. *Schlei & Grossman*, *supra* note 32, at 1291.

80. 411 U.S. 792, 93 S. Ct. 1817 (1973).

81. *Id.* at 802, 93 S. Ct. at 1824.

Once an employee has established a prima facie case, the burden of proof shifts to the employer:<sup>82</sup> "In order to rebut the presumption of intentional discrimination, the employer must articulate 'some legitimate, nondiscriminatory reason' why the plaintiff was rejected or someone else was preferred; otherwise, the factfinder is required to find for the plaintiff."<sup>83</sup> The plaintiff, however, bears the ultimate burden of proving discrimination by a preponderance of the evidence.<sup>84</sup>

It must be stressed that an employee who charges his employer with national origin discrimination must ultimately prove that the disparate treatment was, in fact, discrimination, and was not based on some legitimate business reason. Reasons which have been found nondiscriminatory include: "lesser comparative qualifications, attitude problems, effeminism, personal differences with a supervisor or other employees, lack of diligence, political considerations, budgetary constraints, and instances of misconduct and disloyalty."<sup>85</sup>

Even though the employer articulates legitimate, nondiscriminatory reasons for his actions, the plaintiff may still prevail by proving that the "justification" was, in fact, a pretext for discrimination. In *Thornbrough v. Columbus and Greenville R.R.*,<sup>86</sup> the fifth circuit delineated this stage of the case by reliance on Supreme Court decisions. The court said:

The burden of production . . . shifts back to the plaintiff, albeit at a "new level of specificity," to prove that the reasons articulated by the employer are not true reasons but only pretexts. . . . The plaintiff can do this in two ways, [1] "either directly by persuading the court that a discriminatory reason more likely motivated the employer or [2] indirectly by showing that the employer's proffered explanation is unworthy of credence."<sup>87</sup>

Thus a three-stage process is mandated concerning the order and allocation of proof. Nevertheless, a trifurcated trial is not contemplated. The process merely provides a method of analyzing the evidence before the court.<sup>88</sup>

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82. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089 (1981); *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 98 S. Ct. 2943 (1978).

83. *Thornbrough*, 760 F.2d at 639; see also *McDonnell Douglas Corp.*, 411 U.S. at 803, 93 S. Ct. at 1824-25 (1973).

84. See *Texas Dept. of Community Affairs*, 450 U.S. at 254-56, 101 S. Ct. at 1094-95.

85. *Schlei & Grossman*, supra note 32, at 1213-12 n.55-63.

86. 760 F.2d 633 (5th Cir. 1985).

87. *Id.* at 639, quoting *Texas Dept. of Community Affairs*, 450 U.S. at 256, 101 S. Ct. at 1095.

88. See *Schlei & Grossman*, supra note 32, at 1321-22.

*F. "Speak English Only" Rules and the Bilingual Acadian*

In the United States, many businesses require their employees to speak only English on the job, unless they are communicating with customers who choose to speak in a foreign language. Likely reasons for such rules are business justifications such as safety and the fear that English-speaking customers will be intimidated by the "foreign" conversations. For the most part, Acadians in the work force are competent in the English language, and communicating in English at work is not a burdensome requirement. Nevertheless, bilingual older Acadians, and younger Acadians striving to become bilingual, may be more comfortable or fulfilled when communicating in French.

This section will explore whether an employer can require bilingual employees to speak only English on the job either at all times, or only at certain times, as well as the requirements of proper notice of such rules.

*1. English required at all times*

In *Saucedo v. Brothers Well Service, Inc.*,<sup>89</sup> defendant had an informal company "rule," unpublished and not well promulgated, that prohibited employees from speaking Spanish while on the job. The justification for the rule was that any failure of communication during the drilling of an oil well could have disastrous consequences. Plaintiff was discharged for speaking Spanish on the job when he replied to a question by a fellow Spanish worker, even though a well was not being drilled when he did so. The court found that the application of the rule to the casual use of a Spanish phrase in the performance of a routine task in a safe area was not justified by business necessity. For that reason, and because the "rule" had a disparate impact on Mexican-American employees, the court held that the discharge violated Title VII's national origin discrimination provision.

In its Guidelines on National Origin Discrimination, the E.E.O.C. has created a strong presumption against rules requiring the speaking of English at all times. The provision states:

*When applied at all times.* A rule requiring employees to speak only English at all times in the workplace is a burdensome term and condition of employment. The primary language of an individual is often an essential national origin characteristic. Prohibiting employees at all times, in the workplace, from speaking their primary language or the language they speak most comfortably, disadvantages an individual's employment oppor-

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89. 464 F. Supp. 919 (S.D. Tex. 1979).



tunities on the basis of national origin. It may also create an atmosphere of inferiority, isolation and intimidation based on national origin which could result in a discriminatory working environment. Therefore, the Commission will presume that such a rule violates Title VII and will closely scrutinize it.<sup>90</sup>

Although Title VII does not equate national origin with the language one chooses to speak,<sup>91</sup> language identification is extremely important in adhering to one's national origin. Since the French language is the nucleus of the Acadian people, any employment rule which severely curtails the use of French by Acadians should be carefully scrutinized.

## 2. *English Required Only at Certain Times*

In *Garcia v. Gloor*,<sup>92</sup> the plaintiff was a Mexican-American fluent in both English and Spanish, whose duties with the defendant included stocking and sales. The defendant had a rule that prohibited employees from speaking Spanish on the job unless they were communicating with Spanish-speaking customers. The rule did not apply to manual laborers who were not bilingual or to conversations during work breaks.

While away from business customers, the plaintiff was overheard speaking Spanish with another employee and was subsequently discharged. The issue presented was whether the defendant's rule, applied only at certain times, imposed a discriminatory condition on plaintiff's employment. In denying that Title VII commands employers to permit employees to speak the tongue they prefer, the fifth circuit said:

The EEO Act does not support an interpretation that equates the language an employee prefers to use with his national origin. To a person who speaks only one tongue or to a person who has difficulty using another language than the one spoken in his home, language might well be an immutable characteristic like skin color, sex, or place of birth. However, the language a person who is multi-lingual elects to speak at a particular time is by definition a matter of choice.<sup>93</sup>

The court concluded that there was a valid, non-discriminatory reason for the rule as applied, and that no basis for a national origin discrimination suit existed. The E.E.O.C. has tailored its rule to conform to *Garcia*: "An employer may have a rule requiring that employees speak only in English at certain times where the employers can show that the rule is justified by business necessity."<sup>94</sup>

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90. 29 C.F.R. § 1606.7(a) (1985).

91. See *Garcia*, 618 F.2d at 268.

92. 618 F.2d 264.

93. *Id.* at 270.

94. 29 C.F.R. § 1606.7(b) (1980).

Except for a "Speak English Only" rule applicable in "danger areas" in the workplace, or in the case of bilingual employees who refuse to converse with unilingual co-workers or customers in English, the writer finds these discriminatory workplace rules to be unreasonable. Furthermore, the writer strongly disagrees with the court's analysis in *Garcia*. In a country where there are less students of the Russian language than there are English teachers in the Soviet Union and whose diplomatic channels of communication with foreign nations are in a dismal state for want of competent American interpreters, a reasonable person might challenge the wisdom of *Garcia*. Furthermore, the very nature of a "Speak English Only" rule (except in safety circumstances) reeks of xenophobia and misplaced "Americanization." No one can doubt that the true intent of such a rule is to discourage the practice by new immigrants of speaking their native tongue. Hector Garcia was certainly not fired because he upset customers by speaking Spanish—he was not within hearing distance of any customers. Garcia was wrongfully discharged because he practiced his native tongue. Such a situation unfortunately parallels the "Americanization" process in Louisiana in the early twentieth century when educators, both Anglo and Acadians, severely whipped and scorned Acadian boys and girls for speaking French in the classroom and schoolyards.<sup>95</sup> Unfortunately, *Garcia* impresses a judicial imprimatur on blatant national origin discrimination. Language is the lifeblood of every ethnic group. To economically and psychologically penalize a person for practicing his native tongue is to strike at the core of ethnicity.

### 3. *Notice of the Rules*

The E.E.O.C. had formulated the following guidelines concerning the need for adequate notice of a "Speak English Only" rule:

*Notice of the rule.* It is common for individuals whose primary language is not English to inadvertently change from speaking English to speaking their primary language. Therefore, if an employer believes it has a business necessity for a speak-English-only rule at certain times, the employer should inform its employees of the general circumstances when speaking only in English is required and of the consequences of violating the rule. If an employer fails to effectively notify its employees of the rule and makes an adverse employment decision against an individual based on a violation of the rule, the Commission will consider the employer's application of the rule as evidence of discrimination on the basis of national origin.<sup>96</sup>

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95. "The New Louisiana Story," 120 Cong. Rec. 5417, 5418 (March 5, 1974).

96. 29 C.F.R. § 1606.7(c) (1980).

This notice requirement may serve to alleviate some of the harshness of the "informal house rules" on speaking only English in the work place.

*G. National Origin Harrassment and the Native Born Acadian in the Workplace*

It is an unlawful employment practice under Title VII "to discriminate against any individual with respect to his . . . conditions, or privileges of employment, because of such individual's . . . national origin."<sup>97</sup> The E.E.O.C. Guidelines require the employer to provide an environment free of harrassment: "The Commission has consistently held that harrassment on the basis of national origin is a violation of Title VII. An employer has an affirmative duty to maintain a working environment free of harrassment on the basis of national origin."<sup>98</sup>

The Guidelines define national origin harrassment as follows:

Ethnic slurs, and other verbal or physical conduct relating to an individual's national origin constitute harrassment when this conduct: (1) Has the purpose or effect of creating an intimidating, hostile or offensive working environment; (2) has the purpose or effect of unreasonably interfering with an individual's work performance; or (3) otherwise adversely affects an individual's employment opportunities.<sup>99</sup>

In the work life of the Acadian laborer, ethnic harrassment by employers and co-workers is probably the predominant form of employment discrimination experienced. The most insulting and derogatory term levied against Acadians in the work place is the term "coonass." This insulting word was never a proud or complimentary term affixed to the Acadian people. Contrary to the belief of some misinformed sources,<sup>100</sup> the etymology of the term is a relatively recent phenomenon. In fact, the word was never used to describe Acadians prior to World War II. Older Acadians will bear this out.

In World War II, when American troops were stationed in France, it was necessary that the forces establish and maintain communication with the Free French Forces inhabitants. Naturally, the French-speaking Louisiana soldiers provided an invaluable resource to interpret and trans-

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97. 42 U.S.C. § 2000e - 2(a)(1) (1976).

98. 29 C.F.R. § 1606.8 (1980).

99. 29 C.F.R. § 1606.8(b) (1980).

100. Unfortunately, the Honorable Edwin W. Edwards at one time proudly proclaimed that he was a "coonass." Governor Edward's theory was that the word derived from the name given to Andrew Jackson's volunteers when they came to New Orleans in 1815 because they wore coonskin caps with the tails hanging down their necks. See Edwards Under Fire for "Coonass" Jibe, *The State-Times*, Oct. 24, 1972.

mit these communications. The French soldier, possibly threatened by his "long lost cousin," referred to the French-speaking American soldiers as "conasse." The French noun "conasse" is defined as: "a stupid woman or man; used specifically for a bungling prostitute (prostitute jargon circa 1810-35); to a prostitute without a health card (1910); a man who does stupid things (soldier jargon, 1923); in the anatomical sense (16th Century); grossly stupid person (slang, 1718)."<sup>101</sup> The French word "conasse" phonetically resembles the American slur "coonass." The non-French speaking American soldier, either out of jealousy or invidious jest, began to harass the Louisiana soldier by calling him "coonass" as a take off of the word "conasse" used by the French forces.<sup>102</sup>

After World War II, large numbers of non-Louisianians came to south Louisiana for economic reasons and imported the use of the slur in referring to the Acadian inhabitants. Unfortunately, a small contingent of the Acadian population welcomed and promoted its use. This ignorant acceptance was done with the unfortunate belief by some that the term is "cute" or "humorous." Be that as it may, a majority of the Acadian people despise the slur's use. The slur does not have a proud genesis, nor is it indicative of a proud people. "Coonass" is in the same infamous company as other ethnic slurs such as "Dago," "Nigger," "Kike," and "Spick."

In 1981, by Senate Concurrent Resolution,<sup>103</sup> the Louisiana Legislature condemned the use of the term "Coonass." The legislative body traced the slur's infamous history and condemned the sale of any items containing the word.<sup>104</sup>

The pride and morale of all ethnic groups is seriously emasculated when reference is made in a derogatory fashion to denote their group. In the work place, such conduct directly contravenes the purpose of Title VII. By imposing an affirmative duty upon the employer to maintain a harassment-free working environment for all national origin groups, the statute requires the employer to become aware of national origin harassment by both co-workers and non-employees. As one commentator has written, "[n]o longer can an employer plead ignorance and invoke the defense that national origin harassment between workers is merely a personal affair."<sup>105</sup> The harassment at which Title VII is directed is

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101. Larousse's *Dictionnaire des Argots*, Librairie 183 (1965) (quoted from Louisiana Concurrent Senate Resolution No. 170, Louisiana Senate Journal, 7th Reg. Session, 1981 v. 4 (July 12, 1981)).

102. See Louisiana Concurrent Senate Resolution No. 170, Louisiana Senate Journal, 7th Reg. Session, 1981 v. 4 (July 12, 1981).

103. *Id.*

104. *Id.*; see also House Concurrent Resolution No. 68, (May 21, 1974).

105. National Origin Harassment in the Workplace, 8 *Empl. Rel. L.J.* 282, 292 (1982).

not confined to conduct having adverse employment consequences (e.g., discharge or nonpromotion), but also encompasses conduct creating "an intimidating, hostile or offensive working environment."<sup>106</sup>

In its Guidelines, the E.E.O.C. has patterned its provision concerning employer knowledge and acquiescence of, and remedies for, harassment after its Guidelines on Sexual Harassment.<sup>107</sup> The Commission has adopted a tripartite categorization of employer liability.

As to the employer's own acts and those of its supervisors and agents, the employer's liability is absolute:

An employer is responsible for its acts and those of its agents and supervisory employees with respect to harassment on the basis of national origin regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence. The Commission will examine the circumstances of the particular employment relationship and the job functions performed by the individual in determining whether an individual acts in either a supervisory or agency capacity.<sup>108</sup>

Hence, knowledge of the derogatory action is not necessary to impose liability upon the employer.<sup>109</sup>

With respect to conduct between fellow employees, the employer's liability is substantially lessened:

(d) With respect to conduct between fellow employees, an employer is responsible for acts of harassment in the workplace on the basis of national origin, where the employer, its agents or supervisory employees knows or should have known of the conduct, unless the employer can show that it took immediate and appropriate corrective action.<sup>110</sup>

The third category of employer liability refers to acts of non-employees. The Guidelines provide:

An employer may also be responsible for the acts of non-employees with respect to harassment of employees in the work-

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106. 29 C.F.R. § 1606.8 (1980).

107. 29 C.F.R. § 1606.11(a)-(g) (1980).

108. 29 C.F.R. § 1606.8(c) (1980).

109. But see *Meritor Savings Bank v. Vinson*, 54 U.S.L.W. 4703 (June 19, 1986) (Female former assistant bank manager subjected to severe sexual harassment by her male supervisor established a violation of Title VII by proving that discrimination based on sex had created a hostile or abusive work environment regardless of any "economic" or "tangible" discrimination. However, employers are not always absolutely liable for sexual harassment by their supervisors.).

110. 29 C.F.R. § 1606.8(d) (1980).

place on the basis of national origin, where the employer, its agents or supervisory employees, knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing these cases, the Commission will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees.<sup>111</sup>

The E.E.O.C. purposely intended to impose a high duty upon the employer for national origin harassment in the workplace.<sup>112</sup> Many decisions prior to the promulgation of the Guidelines<sup>113</sup> had mandated that comments aimed at a person's ethnic origin be "excessive and opprobrious" or that the employer have knowledge of such disparate harassment, for the employer to be held liable.<sup>114</sup> In particular, one court noted:

[I]t is my belief that employees' psychological as well as economic fringes are statutorily entitled to protection from employer abuse, and that the phrase, "terms, conditions, or privileges of employment" in Section 703 is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination.<sup>115</sup>

## II. THE ALLEGORICAL INTERPRETATION OF "RACE" AND THE APPLICATION OF SECTION 1981 TO "WHITE" NATIONAL ORIGIN GROUPS SUCH AS NATIVE-BORN ACADIANS

For an aggrieved laborer victimized by an unlawful employment practice to succeed under a Title VII claim, the petitioner must first

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111. 29 C.F.R. § 1606.8(e) (1980).

112. See 45 Fed. Reg. 85635 (1980).

113. The Guidelines were promulgated in 1980.

114. See *Carriddi v. Kansas City Chiefs Football Club, Inc.*, 568 F.2d 87 (8th Cir. 1977) (Supervisor's derogatory ethnic comments about plaintiff's ancestry were not unlawful because the remarks were part of "casual conversations" and not "excessive and opprobrious."); cf. *Morales v. Dain, Kalman and Quail, Inc.*, 467 F. Supp. 1031 (E.D. Minn. 1979); *Kidd v. American Air Filter Co.*, 23 F.E.P. 381 (W.D. Ky. 1980); *Fekete v. United States Steel Corp.*, 353 F. Supp. 1177 (W.D. Pa. 1973); *Enriquez v. Transit Mixed Concrete Co.*, 492 F. Supp. 390 (C.D. Cal. 1980); accord 8 Empl. Rel. L. J. 287-292 (1982). See contra, 2 F.E.P. 295 (1969) (Plaintiff, who was butt of Polish jokes by co-employees and was physically harassed, was entitled to judgment against employees who permitted the ridicule.). See also, *Brown v. Parker Hannifan Corp.*, 36 F.E.P. 127 (10th Cir. 1984) (evidence adduced by plaintiff, a German-American who was allegedly discharged for insubordination, that the employer tolerated other employees' slurs directed at plaintiff because of her German ancestry was sufficient to defeat employer's Motion for Summary Judgment).

115. 454 F.2d 234 (5th Cir. 1971).

satisfy some rather rigid procedural prerequisites.<sup>116</sup> For instance, under Title VII, a petitioner must first exhaust his remedies with the E.E.O.C. as well as satisfy strict time limitation requirements.<sup>117</sup> Secondly, petitioner must file a complaint in federal district court within ninety days of receipt of a statutory notice of "right to sue" letter from the E.E.O.C.<sup>118</sup> Furthermore, under Title VII, employers with less than fifteen employees are exempted from the coverage of the Act,<sup>119</sup> and the Act does not provide for punitive damages and backpay for more than two years.<sup>120</sup> Finally, the overwhelming weight of authority is that there is no right to a jury trial under Title VII.<sup>121</sup>

Many plaintiff attorneys in employment discrimination actions, either out of necessity or out of preference, attempt to procure relief for their clients under alternative statutory authorities such as Section 1981.<sup>122</sup> Section 1981 makes available an independent remedy for employment discrimination, thus providing an alternative to the procedural prerequisites of Title VII. Section 1981 does not require that a complaint be filed with the E.E.O.C.,<sup>123</sup> and the controlling statute of limitations is the most appropriate one provided by state law.<sup>124</sup> Furthermore, an individual is entitled to both compensatory and punitive damages, and a backpay award is not limited by the two-year time period of Title VII.<sup>125</sup> In addition jury trials are available under this section,<sup>126</sup> which also expands the protections beyond the immunities listed under Title VII.

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116. For a comprehensive account of the exhaustive prerequisites to a timely E.E.O.C. charge, see Schlei & Grossman, *supra* note 32, at 1058-92.

117. See Title VII § 706.

118. See Title VII § 706(7)(1). A "Right to Sue" letter is generally perceived as an authorization for the aggrieved person to bring a civil action after the E.E.O.C. has reviewed the circumstances of the charge. See 29 C.F.R. § 1601.28(e)(1). See also *Anooya v. Hilton Hotels Corp.*, 733 F.2d 48 (7th Cir. 1984).

119. As are private clubs and religious institutions. See 42 U.S.C. §§ 2000e, 2000e - 1 (1976).

120. 42 U.S.C. § 2000e - 5(g) (1976). See also Comment, *Developments in the Law - Sections 1981*, 15 Harv. C.R. - C.L.L. Rev. 29, 104-05 (1980) [hereinafter cited as *Developments in the Law*].

121. See, e.g., *Slack v. Havens*, 522 F.2d 1091 (9th Cir. 1975). But see *Curtis v. Loether*, 415 U.S. 189, 94 S. Ct. 1005 (1974) (jury trial under Title VIII of the 1968 Civil Rights Act required because of the right to monetary relief).

122. 42 U.S.C. § 1981 (1976).

123. *Caldwell v. National Brewery Co.*, 443 F.2d 1044 (5th Cir. 1971); see *Developments in the Law*, *supra* note 120, at 105.

124. *Burnette v. Grattan*, 104 S. Ct. 2924 (1984); cf. *Richardson v. Delta Drayage Co.*, 433 F. Supp. 50 (E.D. La. 1977).

125. See, e.g., *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 460, 95 S. Ct. 1716, 1720 (1975).

126. *Setser v. Novack Inc.*, 638 F.2d 1137 (8th Cir. 1981); *Johnson v. Sea Drilling Corp.*, 486 F. Supp. 462 (E.D. La. 1980).

This part will explore the dilemma of a native-born Acadian laborer who attempts to proceed under Section 1981 and who is confronted with jurisprudence which does not allow a "white" ethnic to recover for national origin discrimination under that section.

*A. Guarantees of Section 1981*

All persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws . . . as is enjoyed by white citizens . . . .<sup>127</sup>

The chief rationale for the enactment of this legislation in 1866 was to eradicate the devastating effects of the "Black Codes" of the southern states which had seriously emasculated the recently freed slaves.<sup>128</sup> Nevertheless, the enfranchisement and protection of blacks was not the exclusive reason for the enactment of the legislation. The bill was introduced to protect the civil rights of *all persons* in the United States.<sup>129</sup> As the Supreme Court said in *McDonald v. Santa Fe Trail Transportation Co.*,<sup>130</sup> holding that Section 1981 also protects whites from racial discrimination: "First, we cannot accept the view that the terms of [Section] 1981 exclude its application to racial discrimination against white persons. On the contrary, the statute explicitly applies to 'all persons,' including white persons."<sup>131</sup>

Furthermore, the Court rejected the argument that the phrase, "as is enjoyed by white citizens," was meant to limit the class of Section 1981 to non-whites.<sup>132</sup> The Court emphasized that Congress inserted the

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127. 42 U.S.C. § 1981 (1976). Section 1981 was originally enacted as § 1 of the Civil Rights Act of 1866, Ch. 31, § 1, 14 Stat. 27, pursuant to the enabling clause of the Thirteenth Amendment. After ratification of the Fourteenth Amendment in 1868, the statute was reenacted as part of the Enforcement Act of 1870, Ch. 114 §§ 16, 18, 16 Stat. 144. See Schlei & Grossman, *supra* note 32, at 668.

128. See *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 427-29, 88 S. Ct. 2186, 2197-98 (1968); see also Note, National Origin Discrimination under Section 1981, 51 *Fordham L. Rev.* 919-20 (1983).

129. *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 96 S. Ct. 2574 (1976); see *Ortiz v. Bank of America*, 547 F. Supp. 550, 554 (E.D. Cal. 1982) ("[T]he bill was introduced . . . as a 'bill . . . to protect all persons in the United States in their civil rights'"; "[T]he purpose of the bill was to secure the equality of citizens . . . in the enjoyment of 'civil rights and immunities.'"); Cong. Globe, 39th Cong., 1st Sess. 211, 1117 (1866); cf. *In re Parrott*, 1 F. 481, 508-09 (C.C.D. Cal. 1880) (construing the Fourteenth Amendment to apply to every person whether "Christian or heathen, civilized or barbarous, Caucasian or Mongolian" in light of § 1981, which was enacted "in consonance" with the amendment).

130. 427 U.S. 273, 96 S. Ct. 2574 (1976).

131. *Id.* at 287, 96 S. Ct. at 2582; see also, *United States v. Wong Kim Ark*, 169 U.S. 649, 675-76, 18 S. Ct. 456, 467 (1898).

132. 427 U.S. at 289, 96 S. Ct. at 2583 (quoting *Georgia v. Rachel*, 384 U.S. 780, 791, 86 S. Ct. 1783, 1789 (1966)). See Note, *supra* note 128, at 922; see *Developments in the Law*, *supra* note 120, at 74.



phrase to stress the statute's "racial character," and to indicate that, for purposes of the Act, women or minors were not to be included among "all persons."<sup>133</sup>

Section 1981 prohibits discrimination both by private parties<sup>134</sup> and by state actors.<sup>135</sup> The Supreme Court has interpreted Section 1981 to apply to aliens<sup>136</sup> despite the "racial emphasis" of the statute.<sup>137</sup> The issue of the justiciability of claims based on national origin discrimination has remained unanswered by the Supreme Court. In *Delaware State College v. Ricks*,<sup>138</sup> through a footnote,<sup>139</sup> the Court explicitly left the question unanswered.

Section 1981 was re-enacted in 1870 pursuant to the Fourteenth Amendment.<sup>140</sup> The equal protection clause of that amendment subjects arbitrary state classification based on race and national origin to the highest degree of judicial scrutiny<sup>141</sup> because these classifications are considered "suspect."<sup>142</sup> Therefore, considering the statutory purpose of

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133. 427 U.S. at 295, 96 S. Ct. at 2585; see also *Ortiz*, 547 F. Supp. at 555; Cong. Globe, 39th Cong., 1st Sess. 1115, 157 App. (1866).

134. *Runyon v. McCrary*, 427 U.S. 160, 168, 96 S. Ct. 2586, 2593 (1976); cf. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 437, 88 S. Ct. 2186, 2202 (1968) (companion statute to § 1981, 42 U.S.C. § 1982 (1976) also prohibits acts of discrimination by private parties); see Note, *supra* note 128, at 919.

135. The Civil Rights Cases, 109 U.S. 3, 16, 3 S. Ct. 18, 25 (1883); see Note, *supra* note 128, at 919.

136. *Graham v. Richardson*, 403 U.S. 365, 377, 91 S. Ct. 1848, 1854 (1971); *Takahashi v. Fish and Game Comm'n*, 334 U.S. 410, 419-20, 68 S. Ct. 1138, 1142-42 (1948). See Note, *supra* note 128, at 922 n.27; see also Baier, Foreword: Of Alienage, Judicial Heroes, and Equal Protection, 30 Loyola L. Rev. 619 (1984). But see *Ben Yakir v. Gaylinn Assoc., Inc.*, 535 F. Supp. 543 (S.D.N.Y. 1982) (§ 1981 does not protect aliens from private discrimination on the basis of alienage); cf. *Espinoza*, 414 U.S. 86, 94 S. Ct. 334 (1973) (aliens not covered under Title VII).

137. Cong. Globe, 41st Cong., 2d Sess. 1536 (1870); see *Guerra v. Manchester Terminal Corp.*, 498 F.2d 641 (5th Cir. 1974); cf. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 86 S. Ct. 2186 (1968); *Takahashi*, 334 U.S. at 419-20, 68 S. Ct. at 1142-43.

138. 449 U.S. 250, 101 S. Ct. 498 (1980).

139. *Id.* at 256 n.6, 101 S. Ct. at 503 n.6.

140. *Takahashi*, 334 U.S. at 419-20, 68 S. Ct. at 1142-43; *Hurd v. Hodge*, 334 U.S. 24, 32, 68 S. Ct. 847, 851 (1948); see *Yick Wo v. Hopkins*, 118 U.S. 356, 369, 6 S. Ct. 1064, 1070 (1886) (The Fourteenth Amendment applies universally, without regard to race, color, or nationality and § 1981 was enacted therewith); Note, *supra* note 128, at 940-41.

141. Only a "compelling state interest" will overcome such classifications. See, e.g., *Korematsu v. United States*, 323 U.S. 214, 65 S. Ct. 193 (1944) (The forced imprisonment during World War II of people of Japanese ancestry was upheld because of a compelling need to prevent espionage and sabotage in the U.S.).

142. See, e.g., *Hernandez v. Texas*, 347 U.S. 475, 480, 74 S. Ct. 667, 671 (1954) (Discrimination against Mexican-Americans with regard to jury service was treated in the same way that discrimination against blacks would have been. The test was whether the group suffered from "community prejudices."); cf. *University of California Regents v. Bakke*, 438 U.S. 265, 98 S. Ct. 2733 (1978) (Official discrimination against any ethnic or racial group

Section 1981, it is highly incongruous to proscribe national origin discrimination in all but compelling circumstances under the Fourteenth Amendment and not recognize similar protections under the Act. Furthermore, since aliens are afforded protection under Section 1981 because it was enacted pursuant to the Fourteenth Amendment, a serious anomaly results when an alien who is a victim of employment discrimination based on his ethnic ancestry is successful under Section 1981, while an American citizen of the very same ancestry is denied protection under the same act.<sup>143</sup>

*B. Application of Section 1981 to National Origin Discrimination Claims as Interpreted by the Lower Federal Courts*

The lower federal courts are in dispute as to the correct application of Section 1981 to claims based on national origin discrimination. Four different approaches may be identified. Some courts have resolved the issue by stating that the section does not provide a cause of action for national origin discrimination under any circumstances.<sup>144</sup> Other courts afford Section 1981 protection to Hispanic plaintiffs and other perceived "non-white" groups if the plaintiffs can show that the alleged discrimination was of a "racial" as opposed to a "national origin" character.<sup>145</sup> A third line of cases, which employs what has been labeled the "pragmatic" approach,<sup>146</sup> recognizes the impossibility of distinguishing "race"

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merits "strict scrutiny," even if that group had never been an especially discrete and insular minority.).

143. See generally Note, *supra* note 128, at 938-39.

144. See *Vera v. Bethlehem Steel Corp.*, 448 F. Supp. 610, 613 (M.D. Pa. 1978) (Puerto Rican plaintiffs may not state a cause of action under § 1981 although the discrimination they experience is similar to racial discrimination.); *Hiduchenko v. Minneapolis Medical & Diagnostic Center Ltd.*, 467 F. Supp. 103, 106 (D. Minn. 1979) (Plaintiff of Ukrainian descent was not of a race other than Caucasian and could not state a claim for racial discrimination under § 1981.); see also *Thomas v. Rohner-Gehrig & Co.*, 582 F. Supp. 669 (N.D. Ill. 1984) (White American failed to state a claim under § 1981 for national origin or racial discrimination against foreign corporation operating in the United States.). See generally Note, *supra* note 128, at 920; *Ortiz*, 547 F. Supp. at 559-565 (E.D. Cal. 1982).

145. *Bullard v. OMI Georgia, Inc.*, 640 F.2d 632, 634 (5th Cir. 1981) (recognizing that the distinction between national origin and racial discrimination is extremely difficult to trace); *Apocada v. General Elec. Co.*, 445 F. Supp. 821, 823-24 (D.N.M. 1978) (Spanish surnamed plaintiff granted leave to amend complaint raised pursuant to § 1981 so that he could allege discrimination on the basis of race); *Madrigal v. Certainteed Corp.*, 508 F. Supp. 310 (W.D. Mo. 1981) (§ 1981 applies to Hispanics only to the extent that discrimination stems from motives indistinguishable from racial discrimination); cf. *Budinsky*, 425 F. Supp. 786 (persons of Slavic, Italian or Jewish origin do not fall within coverage of § 1981).

146. See, e.g., *Budinsky*, 425 F. Supp. 786 (plaintiff of Slavic ancestry not within a covered group under § 1981); *Manzanares*, 593 F.2d 968 (plaintiff of Mexican descent who was discriminated against on this basis stated a valid cause of action under § 1981). See generally *Larson*, *supra* note 33, § 94:30 at 20-17.

from "national origin," and extends 1981 coverage only to those national origin groups that are commonly perceived as "non-white" and that have traditionally been the victims of class discrimination.<sup>147</sup> Finally, a fourth category totally rejects using the ambiguous notion of "race" and holds that, to be protected under Section 1981, a plaintiff must belong to a distinctive group that has been treated differently than the groups enjoying the broadest civil rights.<sup>148</sup>

This last approach employs what may be characterized as an "identifiable national origin" analysis. Both the "pragmatic" approach and the "identifiable national origin" analysis reject the distinctions between race and national origin and have established a novel solution to discriminatory employment practices directed against various ancestry groups. The following subparts will review these two approaches.

### 1. The "Pragmatic" Approach

The "pragmatic" approach to Section 1981 was first enunciated by a federal court in *Budinsky v. Corning Glass Works*.<sup>149</sup> In *Budinsky*, the plaintiff raised both Title VII and Section 1981 claims in an employment discrimination action against his former employer. He alleged that he was disparately treated by his employer solely because of his Slavic origin. The defendant moved to dismiss on the basis that, *inter alia*, allegations of discrimination based on national origin are not cognizable under Section 1981.

The thrust of the plaintiff's argument was that, given the dubious utility of the traditional definition of race and the sociological and scientific rejection of that definition, Section 1981 should not be limited to racial classifications. As an alternative, plaintiff submitted:

[Section] 1981 should not stand alone among the post-war Civil Rights Acts as frozen by a wording and legislative history written before the great influx of white European immigrants in this country, but should be expanded to protect all groups of potential discriminatees who are identifiable as a "race" or "nationality," or by "national origin."<sup>150</sup>

In announcing the new "pragmatic" approach, Judge Teitelbaum said:

The terms "race" and "racial discrimination" may be of such doubtful sociological validity as to be scientifically meaningless,

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147. E.g., *Ridgeway v. International Bhd. of Elec. Workers, Local No. 134*, 466 F. Supp. 595, 597 (N.D. Ill. 1979); see generally Note, *supra* note 128, at 921.

148. *Ortiz*, 547 F. Supp. 550, 567; *Al-Khazraji v. Saint Francis College*, 523 F. Supp. 386, 391-92 (W.D. Pa. 1981).

149. 425 F. Supp. 786.

150. *Id.* at 788.

but these terms nonetheless are subject to a commonly-accepted, albeit sometimes vague, understanding. Those courts which have extended the coverage of § 1981 have done so on a realistic basis, within the framework of this common meaning and understanding. On this admittedly unscientific basis, whites are plainly a "race" susceptible to "racial discrimination;" Hispanic persons and Indians, like blacks, have been traditional victims of group discrimination, and however inaccurately or stupidly, are frequently and even commonly subject to a "racial" identification as "non-whites." There is accordingly both a practical need and a logical reason to extend § 1981's proscription against exclusively "racial" employment discrimination to these groups of potential discriminatees.<sup>151</sup>

Nevertheless, the court denied this protection to "European ethnic groups," stating:

The same cannot be said with regard to persons of Slavic or Italian or Jewish origin. These groups are not so commonly identified as "races" nor so frequently subject to that "racial" discrimination which is the specific and exclusive target of § 1981. Members of these groups, like plaintiff Budinsky, do not properly fall within the coverage of the statute.<sup>152</sup>

In the next paragraph of the opinion, the court presented what is arguably an unworkable application of Section 1981:

We wish to re-emphasize our starting point: The above result might be entirely different were it not for the brief but robust existence of Title VII. That legislation provides a thorough remedy for victims of employment discrimination based on, *inter alia*, national origin. If, as alleged, plaintiff is in fact such a discriminatee, Congress has provided him and others like him with a comprehensive means of redress. For this reason, there is neither need nor justification for judicially legislating § 1981 beyond the specific, prevalent and arguably more difficult mode of employment discrimination to which it is directed.<sup>153</sup>

The judge based his reasoning on the availability, in many cases, of an alternative remedy—Title VII. Nevertheless, merely because a Slavic or Acadian-American has a remedy under Title VII for illegal employment practices does not justify limiting Section 1981 protection. Each

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151. *Id.*

152. *Id.*

153. *Id.* at 788-89; see also *Avigliano v. Sumitomo Shoji Am.*, 473 F. Supp. 506, 514 (S.D.N.Y. 1979).

legislative pronouncement must stand on its own merits and be judged on its own terms and inclusiveness.

Judge Teitelbaum's recognition of the untenability of "racial" distinctions<sup>154</sup> should be applauded, but a more equitable approach would be to apply the true intent of Congress when it enacted Section 1981—i.e., to guarantee the same civil rights to *all* persons, and prohibit illegal discrimination against all groups. Certainly, invidious class discrimination levied against Acadians is as egregious as the same treatment directed against Hispanics or Arab-Americans.<sup>155</sup>

## 2. The "Identifiable National Origin" Approach

In *Ortiz v. Bank of America*,<sup>156</sup> a federal district court completely rejected the exclusivity of the racial standard of Section 1981 and held that a plaintiff may state a valid claim under that section based on either national origin or race.<sup>157</sup> Under the *Ortiz* standard, a plaintiff who alleges national origin discrimination must show that he is a member of a group composed of both sexes, which is not fixed exclusively by age or religious faith, and which is of a character that is or may be perceived as distinct when measured against the groups which enjoy the broadest rights.<sup>158</sup>

The court rejected the racial classification as exclusive under Section 1981 because it found racial tests to be ambiguous and impractical. The court stated:

Today much of modern science's thoughts about the meaning of race, to the degree the term is accepted as meaningful at all, are tied to geographic distribution and culture, *i.e.* the two common components of nationality concepts. Thus, Molnar, after listing several attempts at definitions of race by biologists or anthropologists, observes "The definitions above, though they appear quite diverse, have in common certain factors that they emphasize. The first is an assumption about the role of geographic distribution in race formation. Primarily, the divisions are based on the sharing of a common territory or point in space. . . ." And as Montagu has written "'Race,' it should always be remembered is a human grouping which is culturally

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154. See, e.g., *Banker v. Time Chem., Inc.*, 579 F. Supp. 1183 (N.D. Ill. 1983) (protection offered by § 1981 extended to Americans of East Indian ancestry).

155. In *Al-Khazraji*, 523 F. Supp. 386 (W.D. Pa. 1981), the court held that a college professor who was denied tenure because he was an Arabian born in Iraq could serve as a basis for a valid claim under section 1981.

156. 547 F. Supp. 550.

157. *Id.* at 568.

158. *Id.*

defined in a given society." . . . Thus to the degree that science aids at all in resolution of the legal problem tendered, it appears fair to say that no meaningful distinction can be drawn between "race" and "national origin."<sup>159</sup>

The court went further than the so-called "practical" approach when it added: "It might be argued, however, that even if there is no scientific content to the notion of race — a common meaning exists — and it should be employed. On examination, however, no single meaning sufficient to resolve the issue exists."<sup>160</sup>

The court illustrated how impractical reliance on "race" is as a prerequisite to a Section 1981 cause of action when it said:

Without doubt blacks have been the subject of the most persistent racism in this country. Nonetheless, "racial" justification for discrimination against almost every immigrant (and native) group has plagued this country's intellectual history. Both the German and the Irish immigrants (whose descendants are now generally viewed as "native stock") were believed by many Americans to be "racially" inferior . . . , as were of course the Chinese and American Indians . . . . The history of "racial prejudice" against Jews throughout Europe and in this country appears to be so well known as almost not to require documentation . . . . Indeed the racist quality of thinking in this country is so persistent that it was even used to explain why Northern whites defeated Southern whites in the American Civil War. The idea of race as an element of the history of ideas in this country has frequently been no more than a vehicle of racism, *i.e.*, a presumed inherited defect in those who are not of the racist's kind, however, he defines his kind.<sup>161</sup>

The breadth of Section 1981 should not be limited exclusively to the social conditions existing at the time of its original enactment in 1866. Situations have changed drastically since then and a broader attitude against discrimination has emerged.<sup>162</sup> The concept of discrimination is neither stationary nor confined to a limited number of groups. As Holmes declared in *Towne v. Eisner*:<sup>163</sup> "A word is not a crystal,

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159. *Id.* at 566 (quoting A. Montagu, *Man's Most Dangerous Myth*, 30 *Passim*. (1964) and S. Molner, *Races, Types & Ethnic Groups*, 12-14 (1975)); see generally Note, *supra* note 128, at 929.

160. 547 F. Supp. at 566.

161. *Id.* at 567 (citations omitted); see also *People v. Hall*, 4 Cal. 399, 404-05 (1854); cf. Note, *supra* note 128, at 932.

162. See, e.g., Brest, *Forward: In Defense of the Anti-discrimination Principle*, 90 *Harv. L. Rev.* 1 (1976).

163. 245 U.S. 418, 38 S. Ct. 158 (1918).

transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."<sup>164</sup> Furthermore, the inclusion of whites and aliens within the scope of Section 1981 should lend credence to the position that victims of national origin discrimination should be similarly protected, regardless of their standing to proceed under Title VII.

### C. *Native-Born Acadians Under Section 1981*

Contrary to an obviously erroneous "dictionary" definition of Cajuns,<sup>165</sup> Acadians asserting Section 1981 protection will probably be treated like Americans of southern and eastern European ancestry. These groups are commonly known as the "white" or "caucasian" ethnic groups.<sup>166</sup>

If the Supreme Court adopts the "identifiable national origin" approach in handling Section 1981 claims, the three-prong test as set forth in *Ortiz*<sup>167</sup> for determining whether a plaintiff has stated a valid claim under Section 1981 based on national origin discrimination, as applied to a native-born Acadian, reveals the following:

1. Native-born Acadians are comprised of both men and women;
2. The boundaries of the group are not fixed by age or exclusively by religious faith;
3. Native-born Acadians are or may be perceived as distinct when measured against their Anglo-Saxon neighbors who enjoy the broadest rights.

Obviously, Acadians satisfy the first two prongs of the analysis; a more serious challenge, however, may be levied against an Acadian attempting to meet the third prong of the test. A defendant in a Section 1981 claim brought by a native-born Acadian might submit that Acadians

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164. *Id.* at 425, 38 S. Ct. at 159.

165. Webster's Third New International Dictionary 313 (1976) defines "Cajuns" as: "One of a people of mixed white, Indian, and Negro ancestry in southwest Alabama and adjoining sections of Mississippi." A reader should immediately question this account on the basis of the reference to the geographical location as being in parts of Mississippi and Alabama. Also, Acadians have never credibly been defined as being of mixed "racial" bloods. The Acadian's "racial" genesis derives from French stock.

166. See *Hiduchenko*, 467 F. Supp. 103, 106; *Thomas*, 582 F. Supp. 669 (complaint alleging that individuals of the "American race" were discharged by individuals of the "Swiss-German race" did not state claim for relief under § 1981 although plaintiffs were given opportunity to amend their complaint on the basis of "reverse alienage discrimination").

167. First, plaintiff must allege discrimination on the basis of membership in a group composed of both men and women; second, the boundaries of the group must not be exclusively fixed by age or religious faith; and finally, the group must be of a character that is or may be perceived as being distinct when measured against the group which enjoys the broader rights.

have been substantially integrated into the Anglo-American culture, have achieved remarkable economic strides, and are actively represented in the political process. Hence, the Acadians could not be considered a "discrete and insular minority"<sup>168</sup> in need of special legislative protection. An Acadian plaintiff can counter these averments by submitting that the Anglo-conformist and melting pot theories are themselves inherently discriminatory, since they presume assimilation into a majority culture which, inferentially, places a badge of inferiority on the Acadian culture.<sup>169</sup> Furthermore, political representation and economic stability are not satisfactory guidelines for the degree of discrimination which a group must tolerate. As Justice Powell said in *University of California Regents v. Bakke*<sup>170</sup> in rejecting the argument that, since white males are not a "discrete and insular minority" who require extraordinary protection from the majoritarian political process, the court should not apply "strict scrutiny" to the special admissions program at issue: "[T]his rationale has never been invoked in our decisions as a prerequisite to subjecting racial or ethnic distinctions to strict scrutiny. Nor has this Court held that discreteness and insularity constitute necessary preconditions to a holding that a particular classification is invidious."<sup>171</sup>

The native-born Acadian is not attempting to invoke unwarranted protections when he elects to proceed under Section 1981. He is only attempting to invoke the protection he justly deserves, as is borne out by the historical and equitable protections provided by the Act.

### III. THE RIGHTS OF NATIVE-BORN ACADIANS UNDER THE EQUAL PROTECTION CLAUSE

As was indicated in Part II of this article, it is not a foregone conclusion that native-born Acadians should be granted protection under Section 1981, considering the lower federal courts' insistence on limiting the Act's coverage to claims based on racially motivated discrimination. Furthermore, Title VII does not provide a remedy for all employees subjected to illegal employment practices in the workplace. As was discussed, Title VII does not apply to employers who employ less than fifteen employees, nor is it applicable to private clubs or religious

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168. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4, 58 S. Ct. 778, 783 n.4 (1938) (prejudice against "discrete and insular" minorities may be a special condition which tends to curtail the operation of those political processes ordinarily to be relied upon to protect minorities.).

169. See Munafo, *National Origin Discrimination Against Americans of Southern and Eastern European Ancestry: A Review of the Legal History and Judicial Interpretations*, 25 Cath. Law. 50, 72 (1979).

170. 438 U.S. 265, 98 S. Ct. 2733 (1978).

171. *Id.* at 290, 98 S. Ct. at 2748.



institutions.<sup>172</sup> Likewise, the corresponding Louisiana fair employment statute<sup>173</sup> exempts from the definition of covered employers those with fewer than fifteen employees. Also, it is possible that Acadian discriminatees will not meet some of the stern procedural prerequisites of Title VII, and consequently, may be left without a statutory remedy.

The purpose of this part is to examine the feasibility of a native-born Acadian prevailing in a class-based claim under the equal protection clause of the Fourteenth Amendment,<sup>174</sup> in light of the plaintiff's burden of proving the requisite "state action"<sup>175</sup> and that the disparate treatment spawned from a purposefully discriminatory intent.<sup>176</sup>

*A. "Suspect" Classifications Based on National Origin and the Native-Born Acadian*

Whenever a state or local government<sup>177</sup> or agency thereof intentionally discriminates against a class of people based on race<sup>178</sup> or national origin,<sup>179</sup> and, under certain circumstances, alienage,<sup>180</sup> the courts should

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172. 42 U.S.C. § 2000e, 2000e-1 (1976).

173. La. R.S. 23:1006 (1985).

174. U.S. Const. amend. XIV. The Fourteenth Amendment provides in pertinent part: "No state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws."

175. See Civil Rights Cases, 109 U.S. 3, 3 S. Ct. 18 (1883) (State action is the focus of the Fourteenth Amendment; "[i]ndividual invasion of individual rights" is not prohibited thereby. *Id.* at 11, 3 S. Ct. at 21.). But see *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 81 S. Ct. 856 (1961) (If the conduct of the government is sufficiently involved in the private person's conduct or encourages that conduct or benefits therefrom, then the private person's acts will be deemed state action.).

176. State or other governmental conduct must have a racially or ethnically discriminatory purpose to render it unconstitutional. See *Washington v. Davis*, 426 U.S. 229, 96 S. Ct. 2040 (1976); contra *Griggs*, 401 U.S. 424, 91 S. Ct. 849 (1971).

177. The Fourteenth Amendment applies to any state, including all subdivisions or local governments within a state. The due process clause of the Fifth Amendment imposes a similar equal protection mandate upon the federal government. See *Nowak, Rotunda, and Young, Constitutional Law* 536 (2d ed. 1983).

178. See, e.g., *Loving v. Virginia*, 388 U.S. 1, 11, 87 S. Ct. 1817, 1823 (1967) (state law prohibiting interracial marriages violative of equal protection although applicable to both whites and blacks alike, because it had for its purpose an invidious intent—to "preserve racial integrity").

179. See, e.g., *Hernandez*, 347 U.S. 475, 74 S. Ct. 667 (discrimination against Mexican-Americans in reference to jury service treated in same way that discrimination against blacks would have been).

180. See, e.g., *Graham*, 403 U.S. 365, 91 S. Ct. 1848 (classifications based on alienage inherently suspect and subject to close judicial scrutiny). Contra *Foley v. Connelie*, 435 U.S. 291, 98 S. Ct. 1067 (1978) ("It would be inappropriate . . . to require every statutory exclusion of aliens to clear the high hurdle of 'strict scrutiny,' because to do so would 'obliterate all the distinctions between citizens and aliens, and thus, depreciate the value of citizenship.'" *Id.* at 294, 98 S. Ct. at 1070, quoting *Nyquist v. Mauclet* 432 U.S. 1, 97 S. Ct. 2120 (1977)).

subject the government classification to "strict scrutiny."<sup>181</sup> This is so because the governmental classifications are deemed to be "suspect,"<sup>182</sup> and should be struck down as violative of equal protection if it is shown that the purpose for the invidious classification was to discriminate against a protected group. The same principle applies even if it is shown that the governmental classification, though racially or ethnically neutral on its face, is administered in a discriminatory fashion,<sup>183</sup> or if it can definitively be inferred that the governmental scheme was to discriminate intentionally.<sup>184</sup>

In *Hernandez v. Texas*,<sup>185</sup> the petitioner, an American of Mexican ancestry, was convicted and sentenced for a murder. The petitioner alleged that since persons of Mexican descent were systematically excluded from service on the various juries, he was deprived of equal protection of the laws guaranteed by the Fourteenth Amendment. The Supreme Court found for the petitioner, holding that the systematic exclusion of eligible Mexican-Americans from jury service violated the equal protection clause. In an opinion authored by Chief Justice Warren, the Court said: "The exclusion of otherwise eligible persons from jury service solely because of their ancestry or national origin is discrimination prohibited by the Fourteenth Amendment."<sup>186</sup>

The Court reasoned that the Fourteenth Amendment is not limited solely to a two-class, "white" and "black," racial classification, but is concerned more generally with invidious class prejudice. The Court said:

Throughout our history differences in race and color have defined easily identifiable groups which have at times required the aid of the courts in securing equal treatment under the laws. But community prejudices are not static, and from time to time other differences from the community norm may define other groups which need the same protection. Whether such a group exists within a community is a question of fact. When the existence of a distinct class is demonstrated, and it is further

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181. The highest level of judicial review imposed upon a governmental classification. To survive "strict scrutiny," the classification must be necessary to promote a compelling state interest. See *Korematsu*, 323 U.S. at 216, 65 S. Ct. at 194.

182. Classifications by the government which treat differently a group which has historically been victimized by discriminatory acts. See, e.g., *Korematsu*, 323 U.S. 215, 65 S. Ct. 193.

183. E.g., *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S. Ct. 1064 (1886) (ordinance, although neutral on its face, unenforceable when its application would oppress members of the Chinese race).

184. *Rogers v. Lodge*, 458 U.S. 613, 102 S. Ct. 3272 (1982) (at-large electoral system of county government maintained for invidious purpose of diluting voting strength of black population created an inference of intentional discrimination).

185. 347 U.S. 475, 74 S. Ct. 667.

186. *Id.* at 479, 74 S. Ct. at 671.

shown that the laws, as written or as applied, single out that class for different treatment not based on some reasonable classification, the guarantees of the Constitution have been violated. The Fourteenth Amendment is not directed solely against discrimination due to a "two-class theory"—that is, based upon differences between "white" and Negro.<sup>187</sup>

The Court adopted a flexible "community prejudices" test which apparently varies from community to community. This test would appear to provide protection for any ethnic group that can demonstrate a real existence of animus directed against the group on a regional basis.

In *Hernandez*, it was shown that in the county where the petitioner was tried, Mexicans were looked upon as a separate class by the "whites" and were subjected to downgrading class prejudice. Mexican children were forced to attend separate schools from the white children, and some business establishments would not serve Mexicans. At the courthouse square there existed separate toilet facilities for whites and Mexicans.<sup>188</sup> The above factors were significant in helping petitioner show the discriminatory atmosphere in the community.

It is highly unlikely that, until relatively recently, Acadians were subjected to such blatant class prejudice as was the case in Jackson County, Texas toward Mexicans. Nevertheless, Acadians have been exposed to a more subtle or latent form of class discrimination which, in many instances, continues to the present date. It must be remembered that Acadians have migrated to regions outside of Louisiana where the Anglo-Americanized way of life predominates and where they are still looked upon as "bas clas." For example, a substantial community of Acadians resides in east Texas in cities such as Port Arthur and Orange. It is extremely common to hear Acadians from these areas pronounce their Acadian surnames in a way which is more phonetically pleasing to their Anglo neighbors.<sup>189</sup>

In 1880, in dictum, the Supreme Court adopted a premise which may have far reaching effects in bolstering the position that invidious class prejudices directed against Acadians and other "white" ethnic groups should be subjected to strict scrutiny. In *Strauder v. West Virginia*,<sup>190</sup> the petitioner, a black, was convicted of murder by a jury from which blacks had been barred pursuant to a state law which allowed

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187. Id. at 478, 74 S. Ct. at 670.

188. Id. at 479, 74 S. Ct. at 671.

189. E.g., the Acadian surname "Trahan" is often pronounced "TRAHAN" when in fact the French pronunciation would be "TRÄHAN."

190. 100 U.S. 303 (1880).

only white males to serve as jurors.<sup>191</sup> In holding that the statute discriminated against blacks as a class on its face, and therefore violated the equal protection clause, the Court stated: "Nor if a law should be passed excluding all naturalized Celtic Irishmen, would there be any doubt of its inconsistency with the spirit of the [Fourteenth] [A]mendment."<sup>192</sup> Although this language is pure dicta, it demonstrates that, even in the early years of equal protection, the Supreme Court was willing to subject *any* officially sanctioned class prejudice to a high form of judicial scrutiny.

The modern Supreme Court has substantially widened the protection afforded to ethnic groups. In *University of California Regents v. Bakke*,<sup>193</sup> Justice Powell, who announced the opinion of the Court, attacked the notion of a "two-class theory" in analyzing suspect classifications and opted to hold *any* ethnic or racial classification to strict scrutiny. The opinion stated:

During the dormancy of the Equal Protection Clause, the United States had become a Nation of minorities. Each had to struggle—and to some extent struggles still—to overcome the prejudices not of a monolithic majority, but of a "majority" composed of various minority groups of whom it was said—perhaps unfairly in many cases—that a shared characteristic was a willingness to disadvantage other groups. As the Nation filled with the stock of many lands, the reach of the Clause was gradually extended to all ethnic groups seeking protection from official discrimination.<sup>194</sup>

The Justice added: "Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination."<sup>195</sup>

As the Supreme Court said in *Hirabayashi v. United States*,<sup>196</sup> "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."<sup>197</sup> Certainly, in the name of freedom and justice, this same principle applies to the Acadian people wherever they decide to make their home.

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191. The statute provided: "All white male persons who are twenty-one years of age and who are citizens of this State shall be liable to serve as jurors." See *id.* at 305.

192. *Id.* at 308.

193. 438 U.S. 265, 98 S. Ct. 2733 (1978).

194. *Id.* at 292, 98 S. Ct. at 2749; see also *Truax v. Raich*, 239 U.S. 33, 36 S. Ct. 7 (1915) (regarding Austrian resident aliens).

195. 438 U.S. at 291, 98 S. Ct. at 2748.

196. 320 U.S. 81, 63 S. Ct. 1375 (1943).

197. *Id.* at 100, 63 S. Ct. at 1385.

*B. Constitutional Prerequisites to a Claim Under the Fourteenth Amendment*

*1. The "State Action" requirement—The private actor as a "pseudo state creature"*

The Fourteenth Amendment does not reach purely private discriminatory conduct. As the Supreme Court stated in *Shelley v. Kraemer*,<sup>198</sup> "[The Fourteenth Amendment] erects no shield against merely private conduct, however discriminatory or wrongful."<sup>199</sup> The commands of the equal protection clause apply only to prejudicial misconduct instituted by the state or by private individuals or entities where it can be said that the conduct is "fairly attributable to the state."<sup>200</sup> This subsection will explore the possibilities of holding a private actor responsible under the equal protection clause for intentionally invoked disparate treatment directed against Acadians as a class, especially in situations where the discriminator would be free from suit.<sup>201</sup>

The Supreme Court has indicated that there is no "bright line" test to determine whether particular discriminatory conduct is "private" or amounts to "state action." In *Burton v. Wilmington Parking Authority*,<sup>202</sup> the Court indicated that whether "state action" exists in a particular situation can be determined "[o]nly by sifting facts and weighing circumstances."<sup>203</sup> The crucial factor is the interplay of the governmental and private action.<sup>204</sup>

In short, if it can be shown that the private discriminator was operating in a function which has traditionally been the exclusive domain of the state,<sup>205</sup> or that the governing body has sufficiently involved itself

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198. 334 U.S. 1, 66 S. Ct. 836 (1948).

199. *Id.* at 13, 66 S. Ct. at 842.

200. See, e.g., *Frazier v. Board of Trustees*, 777 F.2d 329 (5th Cir. 1985).

201. The proper action to bring under these circumstances is for a "deprivation under 'color of law.'" 42 U.S.C. § 1983 (1985). Section 1983 allows a private suit for damages caused as a result of one who "under color of any [state] statute" or "other laws" deprives another of "any rights, privileges or immunities secured by the Constitution and the laws." "State action," while necessary to establish the deprivation of any constitutional rights, when present, is also sufficient to meet the under color of law element of § 1983 itself. *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 102 S. Ct. 2744 (1982).

202. 365 U.S. 715, 81 S. Ct. 856 (1961).

203. *Id.* at 722, 81 S. Ct. at 860.

204. See 16A Am. Jur. 2d Constitutional Law § 743 (1979).

205. See, e.g., *Terry v. Adams*, 345 U.S. 461, 73 S. Ct. 809 (1953) (the holding of primaries); *Marsh v. Alabama*, 326 U.S. 501, 66 S. Ct. 270 (1946) (privately owned company town); *Robinson v. Price*, 553 F.2d 918 (5th Cir. 1977) (private non-profit corporation fulfilled a welfare function by expending funds granted to it by the city); *Smith v. Y.M.C.A. of Montgomery, Inc.*, 462 F.2d 634 (5th Cir. 1972) (non-profit civic recreational organization utilized city property and derived funds from the city and conducted recreational programs).

with,<sup>206</sup> encouraged,<sup>207</sup> or benefited<sup>208</sup> from the private party's actions, then the conduct will be considered state action within the ambit of the constitutional protection provided by the equal protection clause. The Supreme Court has said, however, that the mere conferring of a license to a private entity does not constitute sufficient state involvement to hold the private actor accountable.<sup>209</sup> Nor does the mere fact that a private business is subject to state regulation by itself convert its action into that of the state.<sup>210</sup> Although each situation will be judged independently, the Court will insist that the alleged discriminatory conduct come from a person for whom the state is responsible because the actions are otherwise chargeable to the state.<sup>211</sup>

An illustration of such a "symbiotic relationship"<sup>212</sup> which would constitute state action against an Acadian discriminatee might be as follows: A municipality in poor financial straits contracts for the services of a proven financial analyst who specializes in restructuring local governments' economic budgets and who employs a total of fourteen employees. The stricken municipality and the analyst form a relationship

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But cf. *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 98 S. Ct. 1729 (1978) (resolution of private disputes delegated to warehousemen not considered a public function); *Blum v. Yaretsky*, 457 U.S. 991, 102 S. Ct. 2777 (1982) (operation of private nursing home and making patient care decisions not a public function); *Rendell-Baker v. Kohn*, 457 U.S. 830, 102 S. Ct. 2764 (1981) (private school whose income is primarily channeled by public grants not a public function).

206. E.g., *Lugar*, 457 U.S. 922, 102 S. Ct. 2744 (where county clerk and sheriff acted in concert with private entity in obtaining an attachment of petitioner's property, there existed a "joint participation" and hence state action).

207. *Reitman v. Mulkey*, 387 U.S. 369, 87 S. Ct. 1627 (1967) (state action where state voters amended their constitution to provide for racial discrimination and courts enforced its measures).

208. *Burton*, 365 U.S. 715, 81 S. Ct. 856 (1961) (State action was present where a privately-owned and operated restaurant which leased its space in a publicly-owned building from the city parking authority refused to serve black customers. The Court concluded that the Authority had placed "its power, property and prestige" behind the restaurant's discrimination and had become a joint participant in the discrimination. *Id.* at 725, 81 S. Ct. at 862); *Hammond v. University of Tampa*, 344 F.2d 951 (5th Cir. 1965) (state action present in the admissions practice of a private university established largely through the use of surplus city buildings and other city land).

209. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 92 S. Ct. 1965 (1972) (no state action where state granted liquor license to private club which refused service to a black guest of a member, even where the number of licenses was limited); accord *Whitten v. Petroleum Club*, 508 F. Supp. 765 (W.D. La. 1981).

210. E.g., *Blum*, 457 U.S. 991, 1004, 102 S. Ct. 2777, 2786; *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350, 95 S. Ct. 449, 453 (1974).

211. See *Lugar*, 457 U.S. at 937-38, 102 S. Ct. at 2754.

212. The "symbiotic relationship" theory governs cases in which the government has "so far insinuated itself into a position of interdependence [with a private entity] that it must be recognized as a joint participant in the challenged activity." *Burton*, 365 U.S. at 725, 81 S. Ct. at 862 (1961).

of near interdependence to combat the economic plight of the city. If, during the contract period, the analyst would unjustly and invidiously fire one of his Acadian employees merely because of his loathe for Acadians as a class, a strong argument could be waged by the Acadian that his former employer violated the equal protection clause. Under these hypothetical circumstances, the mutual benefits conferred on both the municipality and the private actor, and the extensive interrelation involved, may very well support the conclusion that actions of the analyst should be imputed to the state for purposes of Fourteenth Amendment analysis. It should be noted that the Acadian victim would be remediless under Title VII because his employer had less than fifteen employees. In addition, he arguably would not be covered under Section 1981. Hence, without analyzing the possibilities of a claim under private tort law, the equal protection clause would provide his only remedy.

## 2. The "Purposeful Discrimination" requirement

In *Washington v. Davis*,<sup>213</sup> the Supreme Court reiterated the basic equal protection principle which has existed for over a century. The Court reconfirmed that "the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose."<sup>214</sup> Governmental action is not unconstitutional "solely because it has a racially [or ethnically] disproportionate impact";<sup>215</sup> in order to subject a classification to strict scrutiny, it must be shown that the governmental rule had for its purpose an intent to discriminate against the disfavored group. Requiring proof<sup>216</sup> that particular governmental action constitutes a purposeful device to classify persons on a suspect criterion contrasts sharply with the "adverse impact" theory established under Title VII, under which a court may focus upon the effects of an alleged discriminatory practice rather than on the employer's motivation or intent.<sup>217</sup> If a law or governmental policy on its face,<sup>218</sup> in its application,<sup>219</sup> or "in reality"<sup>220</sup> classifies persons on the basis of race or national origin, the measure will be subjected to strict scrutiny.

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213. 426 U.S. 229, 96 S. Ct. 2040 (1976).

214. *Id.* at 240, 96 S. Ct. at 2048.

215. *Id.* at 239, 96 S. Ct. at 2047 (emphasis by the court).

216. See text accompanying *supra* notes 72-88.

217. In *Washington*, the Court said: "We have never held that the Constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII, and we decline to do so today." 426 U.S. at 238-39, 96 S. Ct. at 2046-47.

218. See, e.g., *Strauder*, 100 U.S. 303.

219. See, e.g., *Yick Wo*, 118 U.S. 356, 6 S. Ct. 1064.

220. See, e.g., *Rogers*, 458 U.S. 613, 102 S. Ct. 3272 (1982).

Nevertheless, the petitioner still bears the burden of proving that there was a discriminatory purpose for the improper classification.

In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,<sup>221</sup> the Court delineated those factors which may be used to determine whether an invidious discriminatory purpose is a motivating factor in a governmental classification. Such factors include disproportionate impact, the historical background of the challenged decision, the specific antecedent events, departures from normal procedures, and contemporary statements of the decisionmakers.<sup>222</sup>

#### IV. ACADIANS' RIGHTS TO INDIVIDUAL DIGNITY AND CULTURAL PRESERVATION UNDER THE LOUISIANA CONSTITUTION OF 1974

##### A. *The Right to Individual Dignity*

The Louisiana constitutional provision corresponding to the equal protection clause of the Fourteenth Amendment provides in pertinent part:

No person shall be denied the equal protection of the laws. No law shall discriminate against a person because of race or religious ideas, beliefs, or affiliations. No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, *culture*, physical conditions, or political ideas or affiliations.<sup>223</sup>

The Louisiana Constitution of 1921 had no such equal protection clause. As one commentator has said, "Louisiana's statement of the equal protection guarantee moves the state from a position of having no equal protection clause in its constitution to that of going beyond the decisional law construing the Fourteenth Amendment."<sup>224</sup>

The delegates to the constitutional convention at which the Louisiana Constitution of 1974 was drafted intended to provide for a bifurcated system of constitutional analysis with respect to certain legislative classifications. To wit, the delegates set forth a rule that there is absolutely no justifiable reason for the state to discriminate against an individual on the basis of race or religion. In reference to the non-exclusive<sup>225</sup>

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221. 429 U.S. 252, 97 S. Ct. 555 (1977).

222. *Id.* at 266-70, 97 S. Ct. at 564; For a comprehensive discussion of the problems associated with "discriminatory purpose," see Gates, *The Supreme Court and the Debate over Discriminatory Purpose and Disproportionate Impact*, 26 Loy. L. Rev. 567 (1980).

223. La. Const. art. I, § 3 (emphasis added).

224. Hargrave, *The Declaration of Rights of the Louisiana Constitution of 1974*, 35 La. L. Rev. 1 (1974).

225. See *id.* at 7 ("The decision to list specific grounds, however, does not mean the listing is exclusive, for the first sentence provides the general rule, 'no person shall be denied the equal protection of the laws'").



classifications found in the third sentence of Article I section 3, such as culture or sex, the state may discriminate against these groups only if the governmental action is not arbitrary, capricious, or unreasonable. To illustrate this point, Delegate Dennery stated:

The authors believe that there is absolutely no basis for any discrimination of any sort on the basis of, on account of race or religion, but they do believe that there can be discrimination if it is not arbitrary, not capricious, and not unreasonable as far as the other items contained in the original committee report are concerned. With the question of birth and age, for instance, a reasonable discrimination is understandable because of drivers' licenses, for example, or for retirement purposes. . . . *Culture* is obvious. There can be certain reasonable discriminations there. For instance, the English language can be the official language of the state, and therefore, that is a reasonable discrimination against the French language.<sup>226</sup>

Delegate Chris Roy of Marksville expressed the Convention's intent in providing for the specific enumerated categories when he said:

We feel that we have to enumerate these various rights because we think that our citizens are entitled to have our court protect them in the future. It's been too many times that even the Supreme Court of the United States has dodged the issue with respect to equal protection. We want to make sure that our justices can clearly understand that when you're going to discriminate, when the state will discriminate against a person for any one of these categories, then the state must show a reasonable basis for it.<sup>227</sup>

Therefore, when the state classifies individuals on the basis of an Article I, section 3 enumerated constitutional classification, such as culture, the state is assigned the burden of justifying such a classification by showing that it substantially furthers a legitimate state purpose and is not arbitrary, capricious or unreasonable.<sup>228</sup>

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226. State of Louisiana Constitutional Convention of 1973 Verbatim Transcripts, Vol. XII, Aug. 30, 1973 at 3 (emphasis added) [hereinafter cited as *Proceedings*].

227. *Id.* at 61.

228. See *Sibley v. Board of Supervisors*, 477 So. 2d 1094 (La. 1985) (on reh'g). In *Sibley*, on rehearing, four members of the supreme court held that under the Louisiana Constitution, legislative classifications based on race and religious beliefs are banned absolutely, and that legislative classifications based on birth, age, sex, culture, physical condition, political ideas or affiliations are permitted if the state can show that the classification is not arbitrary, capricious or unreasonable. At issue in *Sibley* was whether the Medical Malpractice Act, which prohibited malpractice judgments against the state in excess of \$500,000, classified individuals because of their physical condition. See also *Proceedings*, supra note 226, at 62.

The inclusion of culture as a specially enumerated classification came about as the result of demands made by certain Louisiana Francophile groups, such as CODOFIL, interested in protecting the Louisiana French heritage and the continued use of the French language.<sup>229</sup> The original proposal referred to "social origin," but was later amended to "culture" in deference to the strong interest in preserving the French influence in Louisiana.<sup>230</sup>

## *B. The Right to Cultural Preservation*

### *1. Discrimination Against Acadians Under the Early Louisiana Constitutions*

As was discussed in the preface of this comment, the Acadian people experienced a history of invidious ethnic discrimination as they made their way to the United States and Louisiana. The discrimination continued as the Acadians attempted to maintain their culture and language in a country attempting to assimilate all of its citizens into a conformist Anglo-American way of life. Although the Acadians never "melted" into Anglo-America as expected, the barriers set forth severely hampered the preservation of their culture and language. The discrimination, however, was not limited to the private sector; the state of Louisiana contributed heavily to the woes of the Acadian people. This subsection will analyze the official assimilation process directed primarily against the Acadians as set forth under the public education provisions in Louisiana Constitutions from 1864 to 1921.

The first three Louisiana constitutions of 1812, 1845, and 1852 contained no requirements that courses in public schools be conducted solely in the English language; educators in the Acadian parishes were free to conduct their classes in French. In 1864, however, after the defeat of the Confederate forces in the Civil War, Louisiana was forced to revise its constitution. A new political element emerged during Reconstruction which was reflected in the Louisiana constitution.

Under the 1864 constitution,<sup>231</sup> it became unconstitutional to conduct courses in public schools in any language other than English. The Reconstruction Constitution provided: "The general exercises in the common schools *shall* be conducted in the English language."<sup>232</sup> The constitution of 1868 reaffirmed this order.

The Louisiana Constitution was again revised in 1879, and a major change occurred, allowing some autonomy to educators in conducting

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229. See Proceedings, *supra* note 226, at 3; see also Hargrave, *supra* note 224, at 9 n.37.

230. See Proceedings, *supra* note 226, at 3; see also Hargrave, *supra* note 224, at 9 n.37.

231. La. Const. 1864. Often referred to as the "Reconstruction Constitution."

232. La. Const. Title XI, art. 142 (1984) (emphasis added).

language procedures in their classrooms. The constitution of 1879 provided:

The general exercises in the public schools shall be conducted in the English language and the elementary branches taught therein; *provided*, that these elementary branches may be also taught in the French language in those parishes in the State or localities in said parishes where the French language predominates, if no additional expense is incurred thereby.<sup>233</sup>

In 1898, the constitution expanded the French language provisions to apply to all grades, not just the elementary classes, in the Acadian parishes.<sup>234</sup>

Nevertheless, in 1921, during the midst of the "melting pot" resurgence, the state constitution reverted back to its Reconstruction era position on language in the classrooms. The 1921 constitution provided: "The general exercises in the public schools shall be conducted in the English language."<sup>235</sup> Cultural and linguistic ignorance would reign under the State Constitution for another 53 years.

## *2. An Opportunity for Cultural Progress—The Louisiana Constitution of 1974*

Significant measures were taken in Louisiana before the adoption of the 1974 constitution to preserve and maintain the Acadian culture and the French language. In 1968, CODOFIL was established as an official state agency<sup>236</sup> empowered to develop, utilize, and preserve the French heritage and language in Louisiana. Enabling legislation required that the French language and the culture and the history of the Acadian people be taught for a sequence of years in the public school systems of the state.<sup>237</sup>

The cultural renaissance, however, would not succeed overnight. The historical stigma associated with speaking French and living the Acadian life was still ingrained in many Acadians. Ironically, in some parishes the institution of French programs was encumbered by Acadian members of the local school boards. In hindsight, one can understand the apprehension felt by many of these politicians; the guilt and shame imposed upon these people would not wash away overnight. Nevertheless, many Francophiles in Louisiana felt it necessary to push forward for a constitutional mandate to preserve the Acadian and French culture in Louisiana.

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233. La. Const. art. 226 (1879).

234. See La. Const. art. 251 (1898).

235. La. Const. art. 12, § 12 (1921).

236. La. R.S. 25:651-53 (1975).

237. La. R.S. 17:272 (1982).

Article XII, section 4 of the Louisiana Constitution of 1974 provides that "[t]he right of the people to preserve, foster, and promote their respective historic linguistic and cultural origins is recognized." The preservation of the Acadian culture and French language was the catalyst to the section's adoption:

Proponents of the section were primarily Francophones concerned with the protection of the French Acadian culture. Representatives of the Council for the Development of French in Louisiana appeared before the committee several times to urge some recognition of cultural rights . . . . Although the ultimate wording is much broader and although one staff research memorandum suggested that preservation of black culture would also be protected by such a proposal, the preservation of French culture was the driving force.<sup>238</sup>

The practical effects of the section were adequately expressed in a research staff memorandum:

As Judge Babineaux of Lafayette stated in his letter of April 16, 1973, to committee members in support of the proposed section, its adoption would not mean the wholesale replacement of English by French in the parishes of Acadiana. It would only mean that some courses might be taught in French in some parishes depending upon the wishes of the people as expressed through their local school boards. As a practical matter, English will continue to be the dominant language in the state. It would merely provide greater freedom in the use of other languages. The 1921 Louisiana Constitution, Article XII, section 12, prohibits this.<sup>239</sup>

Again, the popular approval of this constitutional provision reflected the thoughts and beliefs of the people of Louisiana that they would not tolerate another attempt to write off cultural growth and preservation in the name of national homogenization.

It is interesting to note that any legislative provision which prohibits the teaching of any subject in any language other than English or that prohibits the teaching of foreign languages was declared unconstitutional by the United States Supreme Court in 1923. In *Meyer v. Nebraska*,<sup>240</sup> the Court struck down such a statute as an arbitrary exercise of the state's police power and an unreasonable infringement of the liberty guaranteed by the Fourteenth Amendment.<sup>241</sup>

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238. Hargrave, "Statutory" and "Horatory" Provisions of the Louisiana Constitution of 1974, 43 La. L. Rev. 647, 682 (1983).

239. CBRE Staff Memo No. 31, May 2, 1973 at X Records: Committee Documents 110.

240. 262 U.S. 390, 43 S. Ct. 625 (1923).

241. *Id.* at 403, 43 S. Ct. at 628.

As indicated earlier, several local school boards elected not to institute the teaching of a second language in the public school curriculums. To overcome this hurdle, by Act 714 of 1975,<sup>242</sup> the legislature set forth a procedure whereby the heads of the households in a local school board jurisdiction may compel their board to implement such a program in the public school curriculum when the board has failed to act.<sup>243</sup> By this legislation, if a petition containing the names of at least twenty-five percent of the heads of households of students attending a particular school within a school board jurisdiction is presented to the local superintendent, the board is under a statutory obligation to implement the second language program within that school's curriculum.

In *Faul v. Superintendent of Education*,<sup>244</sup> the third circuit upheld the constitutionality of this statute. The court held, *inter alia*, that the statute was not unconstitutional as enabling a minority to control a majority, nor inoperable as an usurpation of powers delegated to a local school board.<sup>245</sup>

### Conclusion

Le titre VII de la loi de 1964 (Civil Rights Act of 1964) avait pour but de supprimer sur les lieux de travail toute discrimination basée sur la race et la lignée. L'analyse des travaux préparatoires de la loi ainsi que les interprétations jurisprudentielles et administratives font apparaître qu'un Acadien d'origine peut se prévaloir de la protection de cette loi. Ainsi concluait le juge Hunter dans l'arrêt *Roach*:<sup>246</sup>

[T]he Louisiana Acadian is alive and well. He is 'upfront' and 'main stream'. He is not asking for any special treatments. By affording coverage under the 'national origin' clause of Title VII he is afforded no special privilege. He is given only the same protection as those with English, Spanish, French, Iranian,

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242. La. R.S. 17:273 (1982).

243. The statute provides in pertinent part:

B. (1) If a parish or city school board does not establish a second language program by May 30, 1976, such a program shall be required upon presentation of a petition requesting the instruction of a particular second language. . . . It shall contain the signatures of at least twenty-five percent of the heads of households of students attending a particular school within the jurisdiction of the parish or city school board.

(2) Upon receiving a certified petition, the parish or city school board shall establish the teaching of the designated second language . . . .

(4) The cost of implementing [such a program] will be borne by the local school system.

244. 367 So. 2d 1267 (La. App. 3d Cir. 1979).

245. *Id.* at 1271-73.

246. 494 F. Supp. 215.

Czechoslovakian, Portuguese, Polish, Mexican, Italian, Irish, et al. ancestors.<sup>247</sup>

Les travaux préparatoires de la section 1981 de la loi, révèlent que le législateur ne jamais eu l'intention de limiter son application au seul critère de la race. Considérant l'ambiguïté du terme "race" et les résultats disparates auxquels son interprétation a abouti, il convient, en effet, d'inclure dans la loi toute personne appartenant à une ethnie identifiable et discriminée sur cette base. Tout traitement discriminatoire et intentionnel, à l'encontre des Acadiens, lorsqu'il est le fait d'un employeur lié directement ou indirectement à l'État, doit être considéré comme une violation de l'"Equal Protection Clause" du XIV<sup>ème</sup> Amendement de la Constitution des États Unis d'Amérique.

Afin d'effacer des mémoires les traitements du passé, la Constitution de la Louisiane de l'an mille neuf cent soixante quatorze, proclame le droit à l'identité culturelle de l'individu et des ethnies. Vive les Acadiens!<sup>248</sup>

*James Harvey Domengeaux*

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247. Id. at 218.

248. The English translation of the conclusion is as follows: The taint of disparate treatment in the workplace directed against an individual on the basis of immutable characteristics such as race and ancestry is precisely what Title VII sought to eradicate when it was enacted in 1964. An analysis of the Act's legislative history, and the jurisprudential and administrative interpretations thereof, makes certain that a native-born Acadian is entitled to its protection. As Judge Hunter concluded in *Roach*: "... The legislative history of § 1981 reveals that the authors never intended to limit its coverage to "racial" classifications. In view of the ambiguous notion of "race" and the anomalous results reached when narrowly construing the provision on this basis, individuals who can lay claim to an "identifiable national origin group" and are discriminated against on this basis should be included within the encompassment of the Act. Intentionally discriminatory actions directly or indirectly linked to the state should be considered a violation of the equal protection clause. To eradicate past acts of official class based discrimination, the Louisiana Constitution of 1974 has provided in its charter for protection of cultural preservation and individual dignity. Long live the Acadians!

